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Supreme Court, U.S.
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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

BIOFILM, INC. and DANIEL WRAY,
Petitioners,
VS.
CHARLES O. BOYNTON, ANDREW R. DARLING,
and BSH ENTERPRISES, INC.,
Respondents.

**On Appeal from the California Court of Appeal,
Fourth Appellate District, Division One**

PETITION FOR WRIT OF CERTIORARI

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110 pp

QUESTIONS PRESENTED

Biofilm's petition brings this question to the Court: In a state court action in which a Chapter 11 debtor-in-possession is a party, must the state trial court obey the bankruptcy court's order that the debtor be represented by its own separate counsel, counsel approved by that bankruptcy court?

Daniel Wray raises a separate but related issue: Does a court deprive a party of his right to due process when, upon the sudden and life-threatening illness of that party's trial counsel just as trial is about to start, the court refuses even a brief continuance to retain new trial counsel?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Biofilm, Inc.[1] and Daniel Wray each prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Fourth Appellate District, Division One.

OPINION BELOW

The decision of the California Court of Appeal was not published and is set out in the Appendix, together with the order of the California Supreme Court denying review. (Appendix, pp. 1a and 2a-75a.)

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[1] There is no parent or subsidiary company. Rule 29.6.

JURISDICTION

The decision of the California Court of Appeal, Fourth Appellate District, Division One, was filed on September 16, 1997, and modified, with no change in judgment, on October 10, 1997. The California Supreme Court denied petitions for review on December 23, 1997. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8:

> The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

United States Constitution, Amendment XIV, Section 1:

> . . . nor shall any State deprive a person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

Title 28 U.S.C. Section 1334:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> (c) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdic-

tion of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Title 28 U.S.C. Section 157:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

Title 11 U.S.C. Section 327:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

Title 11 U.S.C. Section 1107:

> (a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

STATEMENT OF THE CASE

Biofilm, and its sole shareholder, Daniel Wray, were defendants in two consolidated civil actions in the California superior court.[2] Their trial counsel, John Huiskamp, was assisted by a real estate transactional lawyer, David Moore. Before the consolidated cases had been assigned to a superior court trial department, Biofilm filed for Chapter 11 bankruptcy protection.[3] The following day, Biofilm and Wray first learned that their trial counsel, Huiskamp, was suffering from a potentially fatal disease. The superior court was immediately informed. Within days, the bankruptcy court, on respondents' motion, lifted the automatic bankruptcy stay thereby permitting the consolidated cases to be assigned to a superior court department for trial. Biofilm and Wray informed the superior court judge to whom the consolidated cases had been assigned that Huiskamp's illness required him to withdraw immediately from the practice of law, and that they needed at least a brief continuance to retain new trial counsel. At the hearing on Biofilm and Wray's continuance motion, they presented uncontradicted evidence that Huiskamp, an experienced jury trial lawyer, was to have been their trial counsel and that Moore was too inexperienced and not competent to try the consolidated cases. Respondents acquiesced in Huiskamp's withdrawal but resisted any continuance for Biofilm or Wray and argued instead that Moore should be made to try the cases. The superior court permitted Huiskamp to withdraw, but denied Biofilm and Wray's motion for any continuance and directed Moore to try the consolidated cases. Trial was set to start in six days.

Biofilm and Wray immediately retained Regina Petty, a very experienced jury trial lawyer, who set everything aside and began to prepare. She filed an application with the bankruptcy court seeking that court's permission to represent the debtor, Biofilm, and also Wray, as special trial counsel. But the bankruptcy court ruled that, because of the potential conflict between a debtor and its sole shareholder, Petty could not represent both Biofilm and Wray. Petty immediately filed a revised application to represent Biofilm only, which the bankruptcy court approved. Petty appeared in the superior court with the bankruptcy court's order authorizing her to appear as trial counsel for Biofilm. She explained that the bankruptcy court's order directed that she represent only Biofilm, and that she was not allowed also to represent Wray:

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[2] *Charles O. Boynton v. Daniel X. Wray, et al.*, State of California Superior Court, County of San Diego, Case No. N62068 and *BSH Enterprises v. Biofilm, Inc., et al.*, State of California Superior Court, County of San Diego, Case No. N64753.

[3] *In re Biofilm, Inc.*, United States Bankruptcy Court for the Southern District of California, Bankruptcy Case No. 95-05017 B11.

> The bankruptcy court is ordering that Wray and Biofilm have separate counsel. We're appearing on behalf of Biofilm. Moore is representing Wray in the trial.[4]

Petty further explained:

> We applied to represent both. The bankruptcy court said no and denied the application and is requiring that Biofilm have separate counsel. I believe in light of the court's requirement, the bankruptcy court's requirement, that has to be handled in a way where Biofilm is treated as a separate defendant throughout the proceedings or we'll be in violation of the bankruptcy court's order.[5]

Petty again made the point:

> If this court requires that any counsel appearing for the defendants at this time act on behalf of both, I have to

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[4] Transcript of June 9, 1995 superior court hearing, Appendix, p. 81a.

[5] Transcript, Appendix, p. 81a.

> report that to the bankruptcy court, and I believe I will be told that I cannot proceed.[6]

The bankruptcy court's order notwithstanding, respondents argued against allowing separate counsel to represent Biofilm. Then, the superior court ruled:

> Bankruptcy [is] . . . not going to tell me how to run the order of proof in this courtroom. And the other thing is the automatic stay from bankruptcy was lifted, so it came over here to state litigation. That's it. As far as they're concerned, they authorized the purportedly bankrupt corporation to hire counsel. **That's as far as their jurisdiction goes. It stops at the front doors of this courthouse.**[7]

The superior court would not permit Petty to represent Biofilm alone; it ruled, instead, that Biofilm and Wray together were entitled to one lawyer only, unless they could demonstrate to the superior court's satisfaction an actual conflict of interest.[8] Caught between the bankruptcy court's order that Biofilm must have separate counsel and the superior court's directive that only one lawyer could represent both Biofilm and Wray, Petty withdrew from the superior court trial and reported to the bankruptcy court what had happened. At a hearing in the bankruptcy court in which respondents participated, that court affirmed what its order meant:

> They [Petty and her firm] were required to withdraw based upon not being able to go forward as counsel for

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[6] Transcript, Appendix, p. 82a.

[7] Transcript, Appendix, p. 83a. [Emphasis added.]

[8] The trial court said that it had established the order of proof and order of precedence and that Biofilm and Wray were a "side," such that only one lawyer could examine witnesses or argue.

> Biofilm in the state court which is what they were authorized to do and I've approved their withdrawal.[9]
>
> * * *
>
> They were not going to be allowed to participate as separate counsel for Biofilm unless they also purported to advance the interests of Mr. Wray in that representation because Judge Cortes made it very clear that only one person was going to be able to do that and it could not be both Moore and Ms. Petty doing that each for the other. Ms. Petty made it very clear and correctly so that this Court's order did not authorize her to do that on behalf of Wray in addition to Biofilm.[10]

The bankruptcy court made clear that Moore was not, and had never been, authorized to represent Biofilm:

> [Mr. Moore's] not authorized by this court to represent Biofilm in the state court proceeding. Period. He's not.[11]

The bankruptcy court identified the problem:

> Ms. Petty point[ed] out that this court had found that because of the problem [potential conflict between a debtor and its sole shareholder] there had to be separate representation for Biofilm, and Judge Cortes' answer to that was, well, one of you can go forward representing both but I'm not going to let both of you go forward representing each client with two shots at it.[12]

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[9] Transcript of June 16, 1995 bankruptcy court hearing, Appendix, p. 85a.

[10] Transcript, Appendix, p. 86a.

[11] Transcript, Appendix, p. 84a.

[12] Transcript, Appendix, p. 85a.

The bankruptcy court reiterated what it had ordered: "And there had to be separate representation for Biofilm."[13] The bankruptcy court warned respondents about the problem they had created:

> Well, the short answer is that if it's a bad judgment — if it went to the jury today and a judgment were returned and it would not be enforceable because Biofilm was not afforded the opportunity for separate representation, then the judgment's no better if the case keeps going . . .[14]

When, at that bankruptcy court hearing, counsel for respondents argued that Petty had failed to demonstrate the existence of an actual conflict, the bankruptcy court rejected that assertion and reiterated what it had previously found:

> [A]t the same time that wasn't her [Ms. Petty's] obligation at that moment in time [to justify a conflict between Biofilm and Wray]. **The fact was this court had ruled that there was a conflict. Period.**
> [Respondent's attorney]: But —
> The court: **And there had to be separate representation for Biofilm.**[15]

Respondents sought no appellate review of the bankruptcy court's separate counsel order, and that order remained in full force and effect until after the superior court jury returned its verdict.

The superior court jury trial lasted six weeks; the case went forward with only Moore representing Wray and purporting to represent Biofilm. The resulting verdict was adverse to both Biofilm and Wray, underscoring Moore's own pre-trial admissions about his inexperience and his competence. The court of appeal affirmed the trial court's judgment and the California supreme court denied review.[16]

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[13] Transcript, Appendix, p. 86a.

[14] Transcript, Appendix, p. 87a.

[15] Transcript, Appendix, p. 85a. [Emphasis added.]

Biofilm and Wray first raised the federal issues this petition presents in the superior court, after new trial counsel appeared, in their motions for a new trial and for judgment notwithstanding the verdict. The superior court rejected Biofilm and Wray's contentions.[17] Biofilm and Wray again raised these issues in the appellate court and in their petitions for review to the California Supreme Court. The court of appeal discussed and rejected Biofilm and Wray's federal law issues in its opinion[18], and the California Supreme Court denied their petition for review without comment.[19]

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[16] The verdict was returned on July 11, 1995. On July 12, 1995, the bankruptcy court entered an order dismissing Biofilm's Chapter 11 proceeding, without prejudice to Biofilm's right to refile immediately if necessary. Biofilm filed a second Chapter 11 case as the stay of execution on the superior court judgment against it was expiring. *In re Biofilm, Inc.,* United States Bankruptcy Court, Southern District of California, Case No. 96-04347-A11. Wray had to seek bankruptcy court protection as well. *In re Daniel X. Wray,* United States Bankruptcy Court, Southern District of California, Case No. 96-05403-A11. Within 30 days of filing, Biofilm and Wray submitted plans to pay their creditors in full and the bankruptcy court confirmed their plans of reorganization.

[17] The superior court's minute order denying Biofilm and Wray's motions for new trial and judgment notwithstanding the verdict is set forth in the Appendix. Appendix, p. 79a.

[18] See Appendix, pp. 17a-22a; 46a-48a.

[19] See Appendix, p. 1a.

The California Appellate Court's Ruling

Ignoring the bankruptcy court's express interpretation of its own order, and that court's prior finding of a conflict between Biofilm and Wray, the appellate court held that the procedure the trial court had mandated did not violate the bankruptcy court's separate-counsel order:

> Although the court also stated that even if Petty chose to represent Biofilm the established order of proof would be followed to permit witness examination by only one defense attorney, the court expressly indicated it would reconsider the order of proof upon a showing of a conflict of interest between Biofilm and Wray . . . . No such conflict has ever been demonstrated by Biofilm or Wray. Instead, expressing concern about possibly violating the bankruptcy court order by appearing to represent Wray as well as Biofilm, Petty and her firm simply declined to make further appearances in the matter.
>
> Manifestly, the superior court believed it was not disobeying the bankruptcy court order authorizing Petty to act as special counsel for Biofilm at trial. Expressly disagreeing with Petty's interpretation of the bankruptcy court order as effectively precluding a limitation of defense argument or examination of trial witnesses to one attorney, the superior court stated it found nothing of the face of such order requiring a change in the order of proof in the superior court proceedings.[20]

The bankruptcy court, however, had already determined that there was a conflict between Biofilm and Wray, such that Biofilm had to have separate counsel. The bankruptcy court had also already found that what the superior court mandated had violated the bankruptcy court's order in three separate respects: first, Biofilm must have counsel independent of Wray's counsel; second, Petty could represent only Biofilm; and third, Moore was not authorized to represent Biofilm. The appellate court attempted, after the fact, to interrupt the bankruptcy court's order in a way that salvaged what had happened at trial — which required the appellate court to disregard the bankruptcy court's express findings, and its interpretation of its own order, and to ignore what the bankruptcy court had already said its separate-counsel order required. Hence, Biofilm respectfully requests this Court to address expressly that state trial and appellate courts' duty to follow a federal court's order includes that federal court's interpretation of its own order in an area of exclusive federal jurisdiction.

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[20] Appendix, p. 18a.

The appellate court also rejected Wray's contention that the superior court's denial of even a brief continuance was a denial of the right to retain counsel and, hence, a deprivation of due process. The appellate court analyzed the question as an abuse of discretion and found that the trial court had acted within its discretion.[21] By so doing, however, the court did not address the due process issue. Hence, Wray respectfully requests this Court to affirm that the due process right to have counsel in a civil trial is rendered meaningless unless it includes the right reasonably to retain and confer with that counsel.[22]

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[21] Appendix, pp. 46a-48a.

[22] The trial court also denied Biofilm any continuance to retain new trial counsel. Biofilm's retention, and the bankruptcy court's approval, of Petty would have cured that deprivation had the trial court allowed Petty to represent Biofilm as the bankruptcy court had directed.

REASONS FOR GRANTING THE WRIT

The petition presents an important issue of federal bankruptcy jurisdiction and the effect of a bankruptcy court's order. In *Celotex*, this Court made clear:

> [i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected [citations omitted].[23]

The parallels between *Celotex* and this case are striking. Both are Chapter 11 cases; in each, the bankruptcy court reiterated what it intended that its order accomplish, and why; in each, the appellate court found reasons to circumvent the bankruptcy court's directive. In *Celotex*, because the bankruptcy court had jurisdiction to issue its injunction order, the order had to be respected. This petition, however, raises an issue not expressly addressed in Celotex: Here, the bankruptcy court had jurisdiction to issue its separate counsel order, raising starkly the question whether, when a federal court issues an order, and then interprets that order, a state court can disregard that interpretation and substitute its own, and in doing so manifestly disregard both the federal court's order and its own interpretation of it?

The second reason for granting the writ is that the superior court's refusal to grant Wray even a brief continuance to retain trial counsel to represent him was not to be reviewed as merely an abuse of discretion, but, rather, was "a denial of a hearing, and therefore, of due process in the constitutional sense."[24]

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[23] *Celotex Corporation v. Edwards*, 514 U.S. 300, 313 (1995).

[24] *Powell v. Alabama*, 287 U.S. 45, 69 (1932). *See Chandler v. Fretag*, 348 U.S. 3, 9-10 (1954).

Because The Bankruptcy Court Had Jurisdiction To Issue Its Separate-Counsel Order, And Because It Was For That Court To Interpret Its Own Order, Its Decision Had To Be Followed Until Reversed.

When Biofilm filed its Chapter 11 petition, it came within the jurisdiction of the bankruptcy court, which, as a unit of the federal district court, took jurisdiction of all of Biofilm's estate.[25] The bankruptcy court's jurisdiction, derived from Article I, Section 8, is grounded in statute. Title 28 U.S.C. § 1334(a) states that federal courts "shall have original and exclusive jurisdiction of all cases under [the bankruptcy code];" title 28 U.S.C. § 1334(b) grants the district courts "original but not exclusive jurisdiction of all proceedings arising under title 11, or arising in or related to cases under title 11." District courts may refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 .... to the bankruptcy judge for the district."[26] While other tribunals may share the bankruptcy court's jurisdiction over civil cases that arise under or in a bankruptcy case, "core" proceedings intimately intertwined with the administration of the bankruptcy case are within the exclusive province of the federal courts. Federal courts likewise "have exclusive jurisdiction over all actions necessarily related to the administration of the bankruptcy case."[27]

The evaluation and approval of a debtor's counsel is at the heart of the administration of the bankruptcy case; proceedings relating to the employment of professionals, since they involve administration of the estate, are "core" proceedings under 28 U.S.C. § 157(b)(2)(A).[28] Although the debtor has broad authority to operate its business under bankruptcy jurisdiction,[29] that authority is specifically circumscribed and subject to "such limitations or conditioning as the [bankruptcy] court prescribes. . . ."[30] The limitations on the retention of counsel are precisely the sort that the bankruptcy court prescribes under Bankruptcy Code §§ 327 and 1107; section 327 requires bankruptcy court supervision and approval.[31] Moreover, to gain court approval to represent the debtor, prospective counsel must disclose not only actual or potential conflicts, but must also describe under oath and in detail all connections with all parties in the bankruptcy estate.[32] The issue whether a conflict exists, or whether such connections create the appearance of a conflict, is not left to the parties themselves; a bankruptcy judge must independently evaluate the information before the debtor is authorized to employ a particular attorney or firm,[33] ensuring that counsel the bankruptcy court appoints to serve the debtor and the bankruptcy estate advances only the debtor's interest — and the interest of no other party. Accordingly, in this case the bankruptcy court would not permit Petty to represent both Biofilm and Wray, precisely to ensure that Biofilm's trial counsel represented the debtor's interests alone.

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[25] 28 U.S.C. § 1334(a) and (e); 28 U.S.C. § 157(a); *In re Johns-Manville Corp.*, 801 F.2d 60, 63 (2nd Cir. 1986).

[26] 28 U.S.C. § 157(a); *Celotex, supra*, 514 U.S. at 307.

[27] *In re Franklin Computer Corp.*, 50 B.R. 620, 624 (Bankr. E.D. Pa. 1985).

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[28] *In re Reams Broadcasting Corp.*, 153 B.R. 520, 522 (Bankr. N.D. Ohio 1993); *see also, In re Oliver's Stores, Inc.*, 79 B.R. 588, 590 (Bankr. D. N.J. 1987) ("Inasmuch as this matter involves an interpretation of Bankruptcy Code Section 327. . ., this Court finds this matter is a core proceeding that involves the administration of this estate. . . .")

[29] 11 U.S.C. § 1107.

[30] 11 U.S.C. § 1107(a).

[31] 11 U.S.C. § 327(a); *David & Hagner, P.C. v. DHP, Inc.*, 171 B.R. 429, 433 (D. D.C. 1994), *aff'd.*, 70 F.3d 637 (D.C. Cir. 1995).

[32] Federal Rule of Bankruptcy Procedure 2014; *In re Coastal Equities, Inc.*, 39 B.R. 304, 308 (Bankr. S.D. Cal. 1984); *In re Devers*, 33 B.R. 793, 799 (D. D.C. 1983).

[33] *In re Flying E Ranch Co.*, 81 B.R. 633, 637 (Bankr. D. Colo. 1988). *See also*, 9 Collier on Bankruptcy (15th Ed. 1996), Sections 2014.02-2014.03 (15th Ed. 1996) ("The purpose of the application for authority to employ a professional is to provide the court . . . with information necessary to determine whether the professional's employment meets the broad test of being in the best interest of the estate.")

Hence, it was not for the superior court to decide whether to allow Petty to represent Biofilm or to direct her also to represent Wray, a party the bankruptcy court had expressly forbidden her to represent. Bankruptcy courts' orders do not "stop at the front doors" of the California superior court.

> The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law.[34]

By telling Biofilm who could and could not act as its trial counsel, or in what circumstances, the superior court usurped a power within the jurisdiction of the federal court under 28 U.S.C. § 1334(a) and on which the bankruptcy court had already ruled. Under Bankruptcy Code § 327, only the bankruptcy court had the power to make that decision.

The superior court's refusal to allow Biofilm separate counsel created a fatal dilemma: either Petty had to disregard the bankruptcy court's order that she represent only Biofilm or ignore the superior court's directive that she represent both Biofilm and Wray. During the subsequent bankruptcy court hearing, that court stated unequivocally and repeatedly what its order meant.[35] That court's treatment of its own order, especially where that treatment said the order meant exactly what it said, was entitled to respect.[36] It was not for either the superior court or the appellate court to determine whether there was a conflict between Biofilm, as debtor, and Wray, its sole shareholder. Rather, the state courts were bound to defer to the bankruptcy court's express determination that such a conflict of interest did exist. Thus, it is no answer for the appellate court to hold that Biofilm never demonstrated an actual conflict. The question whether a conflict existed was within the bankruptcy court's jurisdiction and, that court's determination had to be repeated until reversed.

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[34] *Kalb v. Fauerstein*, 308 U.S. 433, 439 (1940).

[35] See pp. 7-9, above.

> [I]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.[37]

This petition presents the issue of a California appellate court deciding an important federal question in a way that conflicts with this Court's *Celotex* decision. If a state court may, in the face of a bankruptcy court's order and that court's prior interpretation of its own order, construe that order in a manner contrary to what the bankruptcy court expressly said, then the bankruptcy court is effectively deprived of the exclusive jurisdiction conferred by Article I, Section 8, by the Bankruptcy Code and by 28 U.S.C. § 1334.

By Denying Wray Even A Brief Continuance To Engage New Trial Counsel, The Trial Court Deprived Him Of His Due Process Right To Retain Counsel

Wray was wholly without blame that his attorney, Huiskamp, was stricken with a life-threatening illness that forced him to leave the practice of law. Nor is there any supportable dispute that Moore, a real estate transactional lawyer, was not sufficiently experienced or competent to try these consolidated cases by himself. All Wray sought was a brief continuance to retain new counsel. Nor did Wray procrastinate. Within days he had found Petty, who was able to put everything aside and prepare to try the cases, first for Biofilm and Wray together and then — following the bankruptcy court's order — for Biofilm alone. In a civil case, there is a due process right to retained counsel.[38] If a state were "arbitrarily to refuse to" grant a party a brief continuance to retain "counsel employed by and appearing for him," is not such a refusal "a denial of a hearing, and, therefore, of due process in the constitutional sense?"[39] The right to be represented by retained counsel in a civil proceeding has as its necessary corollary the reasonable opportunity to retain and consult with that counsel.[40] Hence, the focus on the denial of the continuance is not whether it was an abuse of discretion but, rather, whether the state courts deprived Wray an important constitutional right secured to him by the Fourteenth Amendment.

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[36] *Matter of Xonies, Inc.*, 813 F.2d 127, 130 (7th Cir. 1987).

[37] *Celotex, supra*, 514 U.S. at 313.

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[38] *Maness v. Meyers*, 419 U.S. 449, 471 (1975) (Stewart, J. concurring); *Powell, supra*, 287 U.S. at 69.

[39] *Id. See Chandler, supra*, 348 U.S. at 9-10.

[40] *Chandler, supra*, 348 U.S. at 10.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One.

Respectfully submitted,
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March 23, 1998

D025783
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

CHARLES O. BOYNTON, ET AL.,
Respondents,

vs.

DANIEL X. WRAY, ET AL.,
and Companion Case
Appellants.

SUPREME COURT
FILED
DECEMBER 23, 1997
Robert Wandruff, Clerk
Deputy

Petitions for review DENIED.
The request for an order directing publication
of the opinion is denied.

[George]
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
D025783
COURT OF APPEAL
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

CHARLES O. BOYNTON, ET AL.,
Plaintiffs and Respondents,

vs.

DANIEL X. WRAY, ET AL.,
Defendants and Appellants.

Superior Court No. N62068

B S H ENTERPRISES, INC.,
Plaintiff and Respondent,

vs.

BIOFILM, INC., ET AL.,
Defendants and Appellants.

Superior Court No. N64753

Court of Appeal Fourth District
Filed September 16, 1997
Stephen M. Kelley, Clerk

APPEAL from a judgment of the Superior Court of San Diego County, Geary D. Cortes, Judge. Affirmed as modified in part; reversed in part.

In these consolidated cases, defendants Daniel X. Wray and Biofilm, Inc., appeal a judgment after trial favoring plaintiffs Charles O. Boynton, Andrew R. Darling, and BSH Enterprises, Inc., on various claims including fraud. Defendants contend the court improperly infringed their right to trial counsel of their choice. Defendants also claim errors involving liability and/or damages with respect to each cause of action. We reverse the portions of the judgment imposing liability on defendants for bad faith denial of existence of contract. We modify the portions of the judgment favoring Boynton against Biofilm and Wray. As so modified, we affirm the remainder of the judgment.

I

INTRODUCTION

Astro-Lube, Inc., a corporation owned by Boynton and Darling, manufactured and sold a product under license from Wray. BSH obtained a judgment confirming an arbitration award against Astro-Lube for unpaid sales commissions. To avoid satisfying the judgment favoring BSH, Astro-Lube fraudulently conveyed its assets to Wray and his corporation Biofilm. Although promising to convey an ownership interest in Biofilm to Boynton and Darling once "the dust settled," Wray refused to do so.

Boynton/Darling and BSH brought separate lawsuits against Biofilm and Wray. The matters were consolidated and tried in four phases over several months. In the first phase of trial, the court rejected defendants' affirmative defense of laches to BSH's causes of action

In the second phase, plaintiffs tried the merits of their claims to a jury. The same counsel represented both defendants.

While the trial was in its second phase, Biofilm filed a petition for bankruptcy. The bankruptcy court lifted the automatic stay against the superior court proceedings and appointed special counsel for Biofilm. Although indicating such special counsel could appear for Biofilm. the superior court stated that absent a showing of conflict between defendants the trial would continue under the established order of proof permitting only one defense attorney to examine witnesses. Special counsel for Biofilm declined further participation at trial. Trial proceeded with both defendants represented by the attorney who had represented them since soon after the inception of the litigation. The jury returned special interrogatories and a general verdict favoring plaintiffs. Meanwhile, the bankruptcy court dismissed Biofilm's bankruptcy petition as filed without a legitimate bankruptcy purpose.

In phase three of trial, after the parties waived a jury, the superior court determined the issue of the amount of punitive damages to be assessed against defendants. In phase four, the superior court granted equitable relief including a determination Biofilm was Wray's alter ego and an injunction restraining Biofilm and Wray from transferring Biofilm's assets or otherwise acting to harm Biofilm or judgment creditor BSH.

II

FACTS

Wray owned the rights to manufacture and distribute a personal lubricant called Astroglide.

In 1982 Boynton formed Astro-Lube to market and distribute Astroglide under license from Wray. Boynton owned 40 percent of Astro-Lube's common stock, Darling 25 percent, and Dan Stoughton 35 percent. Later, Wray also licensed Astro-Lube to manufacture Astroglide.

In 1987 Astro-Lube began manufacturing Astroglide and continued marketing/distributing the product. Astro-Lube's president/chief operating officer Boynton agreed to give Wray a 5 percent stock interest in Astro-Lube.[1]

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[1] In 1989 or 1990, Wray was issued a certificate for such 5 percent interest in Astro-Lube.

Meanwhile, under a 1986 written sales commission agreement with Astro-Lube, BSH through its principal/sole employee William Henry successfully marketed Astroglide to drugstore chains and pharmaceutical wholesalers. In 1989 Astro-Lube terminated BSH's contract and did not pay BSH further commissions. In 1991, after arbitration, BSH received a Los Angeles judgment against Astro-Lube (as later amended) for $164,756.39, the right to future commissions on the sale of Astroglide to specified customers through the year 2001, and 5 percent of the shares in Astro-Lube.[2]

Boynton sought alternatives to paying the Los Angeles judgment favoring BSH against Astro-Lube. Astro-Lube appealed the Los Angeles judgment but abandoned the appeal. Astro-Lube considered filing bankruptcy but was advised it could not do so since the company was solvent and profitable. After incorporating another company to obtain Astro-Lube's assets, Boynton also abandoned that scheme.

In August/September 1991, Wray introduced Boynton to attorney Sandor Boxer. Boxer designed a plan for Astro-Lube to avoid payment of the Los Angeles judgment favoring BSH by transferring most of its intangible assets (its "intellectual property rights" to produce and market Astroglide) to Wray and its tangible assets to a new corporation to be formed (Biofilm). Boynton, Wray and Biofilm sought by various means to conceal the nature of their scheme.

In late 1991, under Boxer's plan, Boynton and Wray created a sham default on Astro-Lube's royalty payments to Wray under their 1987 Astroglide license agreement by making Astro-Lube appear to be insolvent through means of a backdated alteration of such agreement. Under his "security interest" purportedly granted by the altered document, Wray then foreclosed on Astro-Lube's most valuable asset, its intellectual property rights to produce and market Astroglide. Boxer's plan provided that after Wray recovered such rights to Astroglide, Biofilm was to be formed to manufacture and market the product with Wray initially to be Biofilm's sole owner, president, and one of its two directors. Under the scheme, Wray made a secret oral agreement with Boynton to pay Boynton royalties and to transfer 75 percent of Biofilm's stock to Boynton, Darling and Stoughton "when the dust settled" upon expiration of the statute of limitations on Astro-Lube's transfer of assets to Biofilm. Meanwhile, Boynton would continue to operate the business as Astro-Lube had been run, with the same employees, product packaging, equipment, customers and phone lines.

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[2] Several years earlier BSH had paid for such shares in Astro-Lube but they were not delivered until after the Los Angeles judgment favoring BSH.

Implementing Boxer's plan, Astro-Lube claimed insolvency and adopted a corporate resolution to wind up its affairs. In exchange for Wray's forgiving $1,000 of the purported debt owed by Astro-Lube to Wray, Astro-Lube assigned its intellectual property rights in Astroglide back to Wray. In 1992, after formation of Biofilm, Astro-Lube made a bulk sale of its remaining assets including packaging equipment, computers, furniture, and trucks to Biofilm for $39,800 including $10,000 for goodwill.[3]

Biofilm continued Astro-Lube's former business in a new facility with Boynton remaining in charge of operations under a consulting agreement prepared by Boxer and with other employees in essentially their same positions. Wray and Boynton attempted to conceal Boynton's Biofilm management role from BSH. Wray obtained an $800,000 bank loan backed by the Small Business Administration (SBA) for the $600,000 purchase money for the company's new facility, operating capital, and new equipment. Wray and his wife were signatories on the loan documents, with Biofilm as guarantor. In granting the loan, the bank relied on Astro-Lube's successful business history and Boynton's experience in running the company. Wray's March 1992 SEA loan application valued the company at $4.5 million.[4]

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[3] Most of Biofilm's bulk sale purchase money came from Astro-Lube's profits from continued Astroglide sales under an "interim agreement" designed to conceal the fact that although Biofilm ostensibly bought Astro-Lube's assets, Biofilm had no money but instead used assets funneled from Astro-Lube to finance the bulk purchase. Astro-Lube was also the source of other funds for the start-up of Biofilm.

Eventually, Wray began to exercise more influence and control over Biofilm. Wray demoted employees loyal to Boynton and gave their authority to Wray's family and associates.

In 1993 Wray reneged on his secret oral agreement with Boynton to transfer 75 percent of Biofilm'S stock to Boynton, Darling and Stoughton. Wray also refused Darling's request to sign an agreement memorializing their oral stock option agreement made in connection with the SBA loan.

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[4] Meanwhile, in October 1991 Darling lent Biofilm $60,000 for five years. In January 1992 Darling signed a document memorializing the $60,000 loan and received Biofilm's promise to grant him an option to buy 25 percent of Biofilm's shares for $500. When Wray applied for the SEA loan, the SEA told Wray that Darling would have to guarantee the SEA loan since under the written stock option Darling had a 25 percent share in Biofilm. In June 1992 to facilitate the SEA loan approval, Darling at Wray's request signed a document releasing his written stock option. In exchange for Darling's signing the document releasing his written stock option, Wray promised Darling that in about 30 days upon approval and funding of the SEA loan, Biofilm/Wray would reinstate Darling's written option for 25 percent of Biofilm's stock. At the same time, Darling also signed a "stand-by agreement" with the SEA, subrogating his $60,000 loan to the SEA loan so that Biofilm would not pay Darling until after the SEA loan was repaid.

Biofilm/Wray did not honor Wray's oral promise to reinstate Darling's written stock option agreement.

In September 1993, Wray forced Boynton out of Biofilm. These lawsuits ensued.

III

SUPERIOR COURT PROCEEDINGS

A

PLEADINGS

On August 31, 1993, Boynton and Darling sued Wray and Biofilm. (San Diego Super. Ct., case No. N62068.) Boynton and Darling sought an ownership interest in Biofilm. Boynton also sought unpaid royalties. At issue on appeal are Boynton/Darling's first amended complaint's causes of action for (1) Wray's breach of his oral contract to pay Boynton royalties and grant Boynton a stock option in Biofilm; (2) Wray's bad faith denial of the existence of his oral agreement with Boynton; (3) Wray's intentional misrepresentation in falsely promising to pay royalties to Boynton and transfer Biofilm stock to Boynton in return for Boynton's conveying Astro-Lube's assets to Biofilm; (4) Biofilm's breach of its January 1992 written agreement to give Darling an option to buy 25 percent of its stock; and (5) Wray's and Biofilm's intentional misrepresentation in falsely promising to grant Darling an option to buy 25 percent of Biofilm's stock in return for Darling's $60,000 loan to Biofilm. Incorporated into each cause of action was an allegation that Biofilm was Wray's alter ego.

On August 9, 1994, BSH sued Wray and Biofilm as transferees of the fraudulent conveyance of Astro-Lube's assets. (San Diego Super. Ct., case No. N64753.)[5] At issue on appeal are BSH's causes of action against Wray and Biofilm for (1) fraudulently transferring Astro-Lube's assets in violation of the Fraudulent Transfer Act (FTA) (Civ. Code,[6] § 3439 et seq.); (2) conspiring with Boynton/Darling/Stoughton/Astro-Lube to engage in the fraudulent transfer of assets; (3) conspiring with Boynton/Darling/Stoughton/Astro-Lube to breach the fiduciary duty owed to BSH by Boynton/Darling/Stoughton; and (4) conspiring with Boynton/Darling/Stoughton/Astro-Lube to engage in constructive fraud. Incorporated into each cause of action was an allegation that Biofilm was Wray's alter ego.

On September 30, 1994, the two lawsuits were consolidated.

B

PRE-TRIAL MATTERS

Meanwhile, from November 1, 1993, until July 11, 1995, when the jury returned its verdict in the second phase of trial, Attorney David Moore appeared as attorney of record for Wray and Biofilm. During that time, Moore signed all pleadings and argued various motions including demurrers, an application for writ of attachment and summary judgment motions. From November 1, 1993, until May 8, 1995 (the day of trial call), Attorney Boxer in association with Moore also appeared for Wray and Biofilm.

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[5] BSH's complaint also named as defendants Boynton, Darling, Stoughton and Astro-Lube. Stoughton and Astro-Lube defaulted. The portions of the judgment ultimately obtained by BSH against Boynton and Darling have not been appealed.

[6] All statutory references are to the Civil Code unless otherwise specified.

In mid-March 1995, John Huiskamp was associated as an additional trial attorney for Wray and Biofilm. Huiskamp attended several depositions, a pre-trial conference, and appeared at the May 8, 1995, trial call in Vista. Accompanied by Moore, Huiskamp answered "ready" for Wray and Biofilm at the trial call. The Vista presiding judge transferred the matter to downtown San Diego to permit the matter to proceed to trial sooner. Also on May 8, 1995, Boxer withdrew from the case with the consent of Wray and Biofilm.

On May 10, 1995, Huiskamp's office informed opposing counsel that Huiskamp was ill. Later, Huiskamp was diagnosed with hepatitis C.

On May 16, 1995, while these consolidated matters were trailing for trial in superior court, Biofilm through Attorney W. Lee McElravy III filed a Chapter 11 bankruptcy petition. (*In re Biofilm, Inc.*, Bankruptcy Case No. 95-05017 B11, S.D. Cal.)

On May 22, 1995, the bankruptcy court lifted the automatic stay, thus permitting the consolidated cases to proceed in the superior court.

On May 24, 1995, the superior court granted Huiskamp's application to withdraw from representing Wray and Biofilm. Citing Huiskamp's illness and inability to proceed, Wray and Biofilm sought a continuance to permit retention of competent trial counsel. Concluding that Attorney Moore still represented Biofilm and Wray, the court denied the requested continuance and ordered the parties to report for trial on May 30, 1995. Also on May 24, 1995, Wray and Biofilm hired Attorney Regina Petty.

On May 30, 1995, we denied the petition by Wray and Biofilm for a writ of mandate reversing the order denying continuance of trial and for a stay permitting time to hire new trial counsel.

C

SUPERIOR COURT TRIAL

On May 30, 1995, the consolidated cases came for trial in the superior court. Wray and Biofilm associated Attorney Petty's firm as additional counsel of record. Petty and her associate Joe Stansell appeared for Wray and Biofilm, assisting Moore in arguing motions in limine.

On May 31, 1995, Petty and Stansell assisted Moore at the superior court pre-trial conference establishing the order of proof permitting defense examination of witnesses by only one attorney.

From June 1 through 5, 1995, Petty and Stansell assisted Moore in the first phase of the superior court trial on the laches defense asserted by Wray and Biofilm. The court rejected the laches defense.

On June 6, 1995, the superior court granted Petty's firm's request to withdraw as counsel for Wray and Biofilm.

On June 8, 1995, the bankruptcy court approved Petty's firm's application to be retained as special counsel for Biofilm.

Meanwhile, on June 6, 7, 8 and 9, 1995, in phase two of the superior court trial, Moore alone represented Wray and Biofilm during jury voir dire, opening statements, and examination of four witnesses.

Shortly before the noon recess on June 9, 1995, Petty presented the superior court with a bankruptcy court order authorizing her firm to represent Biofilm as special counsel for trial and stated her desire to begin doing so "immediately, with the [superior] court's permission." Petty asserted the bankruptcy court order precluded her from also representing Wray. The superior court told Petty she could represent Biofilm alone. However, the superior court stated that regardless whether Petty chose to represent Biofilm, the superior court would adhere to the agreed-upon established order of proof treating Biofilm and Wray as a single side permitted one attorney in examining witnesses absent a showing that Biofilm's defense would differ from Wray's. Expressing concern about possibly violating the bankruptcy court order by appearing to represent Wray as well as Biofilm, Petty and her firm made no further appearances in the matter. Moore proceeded as sole counsel for Wray and Biofilm.

On June 16, 1995, Biofilm asked the bankruptcy court to enjoin further proceedings in the superior court and reinstate the automatic stay of those proceedings. After argument by counsel, the bankruptcy court made no ruling on the merits of Biofilm's request for injunction/reinstatement but instead continued the matter until the time of hearing on a motion to dismiss Biofilm's bankruptcy petition. The superior court trial thus continued to proceed with Moore acting as counsel for both Wray and Biofilm.

On June 27, 1995, on motion of BSH and Boynton/Darling, the bankruptcy court dismissed the Biofilm bankruptcy petition as filed without a "legitimate bankruptcy purpose." In light of such dismissal, the bankruptcy court determined that Biofilm's motion to enjoin the superior court proceedings was moot.

On July 11, 1995, the superior court jury returned responses to special interrogatories and a general compensatory damages verdict favoring plaintiffs BSH, Boynton and Darling against Wray and Biofilm.[7] The jury also concluded plaintiffs were entitled to punitive damages against Wray and Biofilm. The jury rejected all claims brought by Wray and Biofilm against Boynton and Darling. Upon the parties' stipulation, the court discharged the jury, leaving for court determination the amount of punitive damages and equitable issues.

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[7] By general verdict the jury awarded Boynton $274,316 against Wray and $118,525 against Biofilm. The jury awarded Darling $118,525 against Wray and $178,525 against Biofilm. The jury awarded BSH $685,621 against Wray and $685,621 against Biofilm.

On July 20, 1995, before the third phase of trial (amount of punitive damages), Wray and Biofilm substituted Ed McIntyre as attorney of record in place of Moore.

From July 31 until August 3, 1995, in accord with the parties' jury waiver, the issue of the amount of punitive damages was tried to the superior court. The court awarded BSH, Boynton and Darling punitive damages against Wray and Biofilm.

On September 5 and 6, 1995, in the trial's fourth phase, equitable issues were tried to the superior court. The court concluded Biofilm was Wray's alter ego and "adherence to the fiction of the separate existence of Biofilm as a corporation would sanction a fraud in this case." The court also concluded BSH was entitled to an injunction against Biofilm and Wray restraining further disposition of assets obtained through the fraudulent transfer from Astro-Lube.

D

JUDGMENT

On January 2, 1996, the superior court entered judgment.

The judgment awarded Boynton $274,317 against Wray, consisting of $274,316 compensatory damages and $1 punitive damages. Based on the jury's responses to special interrogatories and the court's finding of alter ego liability, the judgment awarded Boynton $118,526 against Biofilm and Wray jointly and severally, consisting of $118,525 compensatory damages and $1 punitive damages.

The judgment awarded Darling $131,025 against Wray, consisting of $118,525 compensatory damages and $12,500 punitive damages. Based on the jury's responses to special interrogatories and the court's finding of alter ego liability, the judgment awarded Darling $191,025 against Biofilm and Wray jointly and severally, consisting of $178,525 compensatory damages and $12,500 punitive damages.

The judgment awarded BSH $935,621 against Wray, consisting of $685,621 compensatory damages and $250,000 punitive damages. Based upon the jury's responses to special interrogatories and the court's finding of alter ego liability, the judgment awarded BSH $1,135,621 against Biofilm and Wray jointly and severally, consisting of $685,621 compensatory damages and $450,000 punitive damages.

The judgment permanently enjoined Wray and Biofilm from engaging in various transactions involving Biofilm and Astroglide.

Wray and Biofilm appeal.

IV

DISCUSSION

A

BIOFILM'S APPEAL

1

RIGHT TO COUNSEL

Biofilm claims entitlement to a new trial on the ground the superior court denied Biofilm its right to counsel of its choice. (*Kim v. Orellana* (1983) 145 Cal.App.3d 1024, 1027-1028.)[8] Asserting it was "wholly without blame,"

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[8] In *Kim v. Orellana, supra,* 145 Cal.App.3d 1024, the appellate court observed that in a civil proceeding "the due process clause (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7, subd. (a)) guarantees the right of a party to appear by counsel retained at his own expense.

Biofilm contends that during each day of the jury trial the superior court deprived Biofilm of an attorney authorized to represent Biofilm. Specifically, Biofilm asserts the court erred in (1) denying upon Huiskamp's withdrawal a continuance to hire new trial counsel despite the assertedly uncontroverted declarations of Huiskamp and Moore attesting to Moore's incompetence/inexperience and without a showing of prejudice to plaintiffs; (2) refusing to allow Petty to represent Biofilm at trial despite the bankruptcy court's order that Biofilm must have its own separate counsel; and (3) forcing Moore to try the cases on behalf of Biofilm and Wray contrary to the bankruptcy court's order. However, as we shall explain, the superior court did not deny Biofilm its right to counsel of its choice.

(A)

DENIAL OF BIOFILM'S MOTION FOR CONTINUANCE

Biofilm contends the superior court abused its discretion in denying its request for continuance to find a new trial lawyer upon Huiskamp's "sudden" withdrawal. We disagree.

In denying Biofilm's motion for continuance upon Huiskamp's withdrawal, the superior court reviewed the facts of the consolidated cases and stated it was "clear" that "Attorney Moore has, in fact, been involved for a substantial period of time with that factual scenario, with the discovery process, and has also assisted and aided Attorney Boxer."

[Citations.]" (Id. at p. 1027.) However, the appellate court also stated: "Due process does not include the further requirement that competent representation be furnished by counsel in a civil action. The only conduct proscribed by the due process clause of the United States Constitution is conduct that may be fairly attributed to the state; the same is true with respect to the corresponding procedural due process provision of the California Constitution. [Citation.]" (*Ibid.*)

The court also stated: "It appears to me that both defendant Wray and defendant Biofilm originally retained Boxer/Moore. Apparently — from the pleadings I can glean Boxer/Moore was trial counsel and trial counsel up until March of this year. [¶] Apparently, Mr. Moore was associated in with the consent of defendant Wray and defendant Biofilm in August of 1993, and is still representing the defendants up until the present time. [¶] The only thing that has changed is that approximately eight weeks ago an attorney who was purportedly to try the case, albeit be assisted by Mr. Moore, has taken ill. [¶] From what I have gleaned from the declarations, as well as the file, in addition to representations made here today during the course of argument, it appears to me that Mr. Moore was to, in fact, assist Mr. Huiskamp, in the trial of the matter. [¶] In balancing all of these factors, it appears to me that there has not been shown good cause to continue this matter for any material or substantial period of time."

Citing section 9(2)(ii) of the Standards of Judicial Administration (Cal. Rules of Ct., Appen., Div. 1, § 9(2)(ii)), Biofilm asserts Huiskamp's illness constituted good cause for a continuance. However, as Biofilm acknowledges, section 9(2)(ii) of the Standards of Judicial Administration also provides that when trial counsel is ill, the court "in lieu of a continuance" should consider substituting another attorney "depending on the proximity of the illness to the date of the trial, the anticipated duration of the incapacity, the complexity of the case, and the availability of a substitute attorney . . . ." Here, the superior court properly denied the defense request for continuance upon Huiskamp's withdrawal for illness since Moore remained available as counsel for Biofilm. As the superior court found, Moore had participated in the litigation including depositions from almost its outset and was concurrently acting as counsel of record for Biofilm and Wray. Further, the rapid association of Petty's firm immediately after denial of the continuance indicated other capable lawyers were available on short notice. Indeed, Biofilm acknowledges Petty was "fully prepared" to try the cases immediately. Moreover, Petty proceeded to appear for Biofilm at the first phase of trial before withdrawing for reasons unrelated to denial of the defense motion for continuance.

In sum, on this record the superior court acted within its discretion in denying Biofilm's motion for continuance upon Huiskamp's withdrawal.

(B)

SEPARATE COUNSEL FOR BIOFILM

Asserting the superior court insisted that only one attorney appear for Biofilm and Wray together, Biofilm characterizes as prejudicial error infecting the whole trial the superior court's asserted disobedience of the bankruptcy court's order by refusing to allow separate counsel to represent Biofilm alone. However, Biofilm's contention is based upon a mischaracterization of the record. Contrary to Biofilm's assertion, the superior court did not deny Petty's request to represent Biofilm alone as separate counsel. Neither did the superior court state that if Petty represented Biofilm she would be required also to represent Wray. Instead, the record demonstrates that during its colloquy with Petty on June 9, 1995, the superior court indicated it would permit Petty to represent Biofilm alone. Although the court also stated that even if Petty chose to represent Biofilm the established order of proof would be followed to permit witness examination by only one defense attorney, the court expressly indicated it would reconsider the order of proof upon a showing of a conflict of interest between Biofilm and Wray.[9] The court told Petty it would "entertain the substitution of counsel at any other point during the pendency of this trial, if you care to raise that issue [about what has changed with respect to the conflict issue]." No such conflict has ever been demonstrated by Biofilm or Petty. Instead, expressing concern about possibly violating the bankruptcy court order by appearing to represent Wray as well as Biofilm, Petty and her firm simply declined to make further appearances in the matter.

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[9] Specifically, on June 9, 1995, the superior court stated: "[I]f there is to be new counsel for Biofilm, the order of proceedings and order of

Manifestly, the superior court believed it was not disobeying the bankruptcy court order authorizing Petty to act as special counsel for Biofilm at trial. Expressly disagreeing with Petty's interpretation of the bankruptcy court order as effectively precluding a limitation of defense argument or examination of trial witnesses to one attorney, the superior court stated it found nothing on the face of such order requiring a change in the order of proof in the superior court proceedings. Questioning Petty's assertion that the bankruptcy court order prevented her from representing Wray in addition to Biofilm, the superior court also noted there was

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proof remains the same. [¶] Ms. Petty, if you feel that that somehow would prevent you from participating in the case, I'll let you make that decision for yourself. [¶] The other alternative is this: I just merely throw this out. That if Ms. Petty decides to accept representation, that we continue with the same order of proof, the same order of proceedings. [¶] If at some point there appears to be an issue of separate defenses or a conflict of interest, we can address that at a later date." The superior court also observed that when "Petty and her firm started the equitable portion of this trial, there didn't seem to be any separate defenses, didn't seem to be any conflict of interest at that point in time, albeit at this point in time there is grave concern. I don't know why all of a sudden that has happened." In deciding not to alter the order of proof/order of proceedings at the current time, the court indicated it considered the defense position at the beginning of trial that no conflict of interest existed between the defendants, no separate defenses would be advanced, and only one attorney would examine witnesses for the defense side. The court also found that a change in the order of proof/order of proceedings would "create prejudice or some injustice to the other parties."

nothing on the face of such order prohibiting Petty from representing Wray. Further, the record belies Biofilm's contention that the superior court "refused to permit Petty to represent only Biofilm, with another lawyer representing Wray . . . ." Specifically, the superior court told Petty: "The order indicates that Biofilm, Inc. is authorized to retain [Petty's law firm] as special litigation counsel in litigation now pending in superior court of California. That's it. [¶] The rest of the order just pertains to how you're to be compensated. [¶] It appears to me that you've already appeared in this litigation as special counsel by making a special appearance, and you've already represented both Biofilm and Mr. Wray. There doesn't appear, at least on the face of this order, that would indicate that the procedure that we have already started would be in violation of the order. [¶] Mr. Moore is still here. He's still representing Mr. Wray. [¶] However, the state jurisdiction, it is within my discretion to determine what the order of proof will be, and it appears to me that if we were to continue in the same fashion, even though you may take the laboring oar, Mr. Moore is still here to protect any interests or rights of Mr. Wray. [¶] I don't think on the face, as I see it, it would be a violation on your part of the bankruptcy order."

Moreover, the record is devoid of any determination by the bankruptcy court that on June 9, 1995, the superior court — violated the bankruptcy court order authorizing Petty to act as special counsel for Biofilm. Indeed, on June 16, 1995, when faced with Biofilm's request to enjoin further proceedings in the superior court and reinstate the automatic stay on the grounds the superior court's ruling not to alter the burden of proof constituted a violation of such bankruptcy court order, the bankruptcy court did not enjoin/stay the superior court proceedings or direct a different offer of proof at the superior court trial. Instead, making no ruling on the merits of Biofilm's request, the bankruptcy court continued the matter until the time of hearing on a motion to dismiss Biofilm's bankruptcy petition. Stated otherwise, the bankruptcy court effectively declined to enforce Biofilm's/Petty's interpretation of its order authorizing special counsel unless and until it determined Biofilm's bankruptcy petition was filed for a legitimate bankruptcy purpose. Further, by continuing the hearing on Biofilm's request for injunction/reinstatement without determining its merits pending a ruling on contemplated motions to dismiss Biofilm's bankruptcy petition, the bankruptcy court effectively permitted the superior court trial to proceed with Moore continuing to act as sole counsel for both Wray and Biofilm.

Ultimately, on June 27, 1995, the bankruptcy court dismissed Biofilm's bankruptcy petition on the ground it was filed without a legitimate bankruptcy purpose. The bankruptcy court also expressly stated that in light of such dismissal Biofilm's motion to enjoin/stay the superior court proceedings was rendered "moot." Undaunted, Biofilm contends the superior court's actions on June 9, 1995, in asserted disobedience of the bankruptcy court order were void ab initio. However, as discussed, Biofilm's claims of such disobedience are based upon a mischaracterization of the superior court record. As also discussed, the bankruptcy court never determined that the superior court violated the bankruptcy court order authorizing Petty to act as special counsel for Biofilm at the superior court trial. If Biofilm believed the bankruptcy court erred in not make such determination, Biofilm's remedy, if any, was through review in the federal system. (Cf. *Abdallah v. United Savings Bank* (1996) 43 Cal.App. 4th 1101, 1109.)[10] Indeed, citing *In re Larson* (Bankr. 9th Cir. 1993) 156 B.R. 43, 46 and *In re*

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[10] In *Abdallah v. United Savings Bank, supra*, 43 Cal.App.4th 1101, the appellate court stated: " The bankruptcy court ha[s] jurisdiction over all claims alleging willful violation of the automatic stay. [Citation.] The existence of a federal remedy for violation of the stay must be

Carraher (9th Cir. 1992) 971 F.2d 327, 328, Biofilm asserts the bankruptcy court retained jurisdiction to "interpret orders entered prior to dismissal of the case" and the dismissal did "not divest the bankruptcy court from jurisdiction to hear and decide issues after dismissal."

In sum, this record reveals no error by the superior court involving Petty's firm's potential representation of Biofilm at trial. The superior court did not deny Biofilm its right to legal representation by Petty. The superior court simply indicated an intent to adhere to the established order of proof unless a conflict between defendants was demonstrated. Petty declined to associate as trial counsel under those conditions, indicating concern such representation might violate the bankruptcy court order, a concern ultimately lacking any adjudicated validation.

(C)

MOORE'S REPRESENTATION OF BIOFILM

Finally, without merit is Biofilm's contention the superior court violated Biofilm's constitutional right to counsel by rejecting Petty and forcing Moore to try the cases on behalf of Biofilm and Wray contrary to the bankruptcy court order. As discussed, there has not been any adjudication that the superior court violated the bankruptcy court order. As also discussed, the superior court did not reject Petty. Further, contrary to Biofilm's contention, the superior court did not make Biofilm "accept Moore as its trial counsel." Neither did the superior court preclude Biofilm from substituting Petty or any other attorney as counsel of record in place of Moore. (Code Civ. Proc., § 284.) Instead, when Petty declined to associate as counsel at trial, the court simply permitted Moore to continue his representation of Biofilm

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read as an implicit rejection of state court remedies. [Citation.]" (*Id.* at LC P. 1109.)

dating back to soon after the litigation's inception. Nothing in the record indicates that after Petty's departure Biofilm made any attempt to replace Moore until finally substituting McIntyre following the jury's verdict and discharge.

(D)

In sum, the superior court did not deny Biofilm the right to trial counsel of its choice.

2

THEORIES OF LIABILITY

Biofilm contends the superior court erred in entering judgment against Biofilm on causes of action never asserted against Biofilm and on factually and legally "impossible" theories.

(A)

BOYNTON BIOFILM

(i)

BIOFILM'S LIABILITY TO BOYNTON FOR COMPENSATORY DAMAGES

Biofilm contends the portion of the judgment favoring Boynton against Biofilm should be reversed since as the case was pleaded and presented to the jury Boynton assertedly had no claims against Biofilm. (*Moore* v. *California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1024.) In *Moore*, the Supreme Court concluded "the trial court erred in rendering judgment outside the issues raised by the pleadings or at trial. [Citation.]" (*Ibid.*)

Boynton's first amended complaint alleged Wray breached his 1991 oral contract with Boynton by not paying Boynton specified royalties and by not giving Boynton an option to buy 75 percent of Biofilm for $1,500; Wray in bad faith denied the existence of such oral contract; and Wray made an intentional misrepresentation by falsely promising to pay Boynton royalties and transfer Biofilm stock to Boynton in return for Boynton's conveying Astro-Lube's assets to Biofilm. The superior court sent Boynton's case to the jury with instructions on those three theories of Wray's breach of oral contract, Wray's bad faith denial of the existence of the oral contract and Wray's false promise involving such contract. Those jury instructions did not mention Biofilm. Similarly, during closing argument Boynton's counsel referred only to Wray as the defendant on those theories. Further, the court submitted to the jury special interrogatories referring only to Wray as the defendant on those theories.

Responding to those special interrogatories the jury found: (1) Wray and Boynton entered into an oral contract for an option to buy stock in Biofilm and for the payment of a royalty to Boynton; the oral contract did not have a lawful objective; and Boynton was not less at fault than Wray; (2) Wray denied the existence of his oral contract with Boynton without cause to do so; and Wray's conduct in denying the existence of his oral contract with Boynton constituted malice, fraud or oppression entitling Boynton to punitive damages against Wray;[11] (3) Wray intentionally misrepresented to Boynton that he would pay a royalty to Boynton and that he would give Boynton an option to buy stock in Biofilm; and (4) Wray's conduct in making such fraudulent misrepresentation to Boynton constituted malice, fraud or oppression entitling Boynton to punitive damages against Wray. The jury's general verdict found Wray liable to Boynton for $274,316 compensatory damages. However, the jury's general verdict also found Biofilm liable to Boynton for $118,525.

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[11] Defendants contend, and plaintiffs agree, that the portions of the judgment imposing liability on Biofilm and Wray for bad faith denial of the existence of the oral contract with Boynton must be reversed since no such tort exists after *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 102. However, as plaintiffs assert, reversal of those portions of the judgment, does not undermine the general verdict here.

In accord with the general verdict and the court's alter ego finding, the court entered judgment awarding Boynton $274,316 compensatory damages against Wray and $118,525 compensatory damages against Biofilm and Wray jointly and severally. Biofilm attacks the portion of the judgment awarding Boynton $118,525 compensatory damages as outside the issues pleaded and litigated at trial. (*Moore v. California State Bd. of Accountancy, supra*, 2 Cal.4th at p. 1024; *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1744; *Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 265266; *Wallace v. Otis* (1941) 47 Cal.App.2d 814, 815.) Boynton responds that in addition to meaning that any claim against Biofilm was valid against Wray, the court's alter ego finding also meant that any claim against Wray was valid against Biofilm. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) [12] Hence, Boynton concludes that since Biofilm was Wray's alter ego,

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[12] In *Mesler v. Bragg Management Co.*, supra, 39 Cal.3d 290, the Supreme Court observed: "The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests. (Citation.] In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation: 'As the separate personality of the corporation is a statutory privilege, it must he used for legitimate business purposes and must not be perverted. When [the use of a corporation] is abused it will be disregarded and the corporation looked at as a collection or association of individuals, *so that the corporation will be liable for acts of the stockholders* or the stockholders liable for acts done in the name of the corporation.' [Citation.]" (*Id.* at p. 300, italics added; see also *Wenban Estate, Inc. v. Hewlett* (1924) 193 Cal. 675, 696-697; *McLoughlin v. L. Bloom Sons Co., Inc.* (1962) 206 Cal.App.2d 848, 850, 854; *Wilson v.*

Biofilm was responsible to Boynton for Wray's breach of contract and tort of intentional misrepresentation. Biofilm counters that such use of the alter ego doctrine under the circumstances here would constitute an impermissible "double dip."[13] We agree with Biofilm.

By general verdict the jury awarded Boynton $274,316 compensatory damages against Wray and $118,525 compensatory damages against Biofilm. The portion of the general verdict awarding Boynton $118,525 compensatory damages against Biofilm was outside the issues pleaded and submitted to the jury. (*Moore v. California State Bd. of Accountancy, supra,* 2 Cal.4th at p. 1024.) Boynton essentially contends the portion of the judgment awarding compensatory damages against Biofilm should be upheld because the court assertedly awarded such damages against Biofilm by applying the alter ego doctrine to hold Biofilm liable for Wray's adjudicated misconduct. However, the language of the judgment belies Boynton's contention. Under Boynton's theory the judgment would simply have awarded Boynton $274,316 compensatory damages against Wray and Biofilm and severally upon application of the alter ego doctrine. Instead, the judgment awarded Boynton $274,316 compensatory damages against Wray alone. Expressly citing the alter ego finding, the judgment then proceeded to award Boynton $118,525 compensatory damages against Biofilm

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Nobell (1953) 119 Cal.App.2d 341, 348; *Taylor v. Newton* (1953) 117 Cal.App.2d 752, 753, 758-760.)

[13] Specifically, Biofilm argues: "As Boynton would have it, Wray is Biofilm; Biofilm, Wray. Even under that interpretation, however, Boynton has only one defendant against which he has one set of claims. one set of claims equals one basis for damages whether against Biofilm or Wray. Event (sic] the alter-ego doctrine does not get Boynton over the hump that, with respect to Biofilm, no cause of action means no liability; no liability means no damages. Boynton also asserted causes of action against Wray on which he was awarded damages. He cannot double dip." (Emphasis in original.)

and Wray jointly and severally. In reality, the court thus awarded damages against Wray by applying the alter ego doctrine to hold Wray liable for Biofilm's misconduct. However, as discussed, any implied adjudication that Biofilm was liable for its own direct misconduct would be outside the issues pleaded, litigated and submitted to the jury. (*Ibid.*) Hence, the portions of the judgment favoring Boynton against Biofilm and Wray must be modified to provide that Boynton is awarded $274,316 compensatory damages against Biofilm and Wray jointly and severally.

(ii)

BOYNTON'S ENTITLEMENT TO PUNITIVE DAMAGES AGAINST BIOFILM

The court awarded Boynton $1 punitive damages against Biofilm. Biofilm attacks the portion of the judgment awarding Boynton $1 punitive damages from Biofilm as outside the issues pleaded and litigated at trial. (*Moore v. California State Bd. of Accountancy, supra*, 2 Cal.4th at p. 1024; *Ostling v. Loring, supra*, 27 Cal.App.4th at p. 1744; *Howard v. Schaniel, supra*, 113 Cal.App.3d at pp. 265-266; *Wallace v. Otis, supra*, 47 Cal.App.2d at p. 815.) Since the jury made no finding of oppression, fraud or malice against Biofilm with respect to the causes of action pursued by Boynton, Boynton was not entitled to punitive damages from Biofilm. (*Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 481-482.) Further, as discussed, despite the court's award to Boynton of $1 punitive damages against Wray, under the circumstances here the doctrine of alter ego does not apply to support a separate $1 punitive damages award against Biofilm. (*Moore v. California State Bd. of Accountancy, supra*, 2 Cal.4th 468 at p. 1024.)

In sum, the superior court erred in awarding Boynton punitive damages against Biofilm. Hence, the portions of the judgment favoring Boynton against Biofilm and Wray must be modified to provide that Boynton is awarded $1 punitive damages against Biofilm and Wray jointly and severally.

(B)

DARLING v. BIOFILM

Darling's first amended complaint alleged that in January 1992 Darling and Biofilm entered into a written agreement; under the written agreement Darling would lend Biofilm $60,000 for five years in return for Biofilm's paying interest on the loan and granting Darling an option to buy 25 percent of Biofilm's stock for $500; and Biofilm breached the 1992 written agreement by not providing Darling with a written option to buy 25 percent of Biofilm or, alternatively, not conveying to Darling 25 percent of Biofilm's stock. Darling's first amended complaint also alleged Wray as an individual and on Biofilm's behalf made an intentional misrepresentation by falsely promising to grant Darling an option to buy 25 percent of Biofilm's stock for $500 in return for Darling's lending Biofilm $60,000; in connection with Wray's attempt to obtain the SBA loan, Darling at defendants' request signed a document purporting to terminate his rights to the stock option for $1; Wray promised Darling that such document would not be enforced but defendants later took the position that Darling had released his stock option for $1; in reliance on defendants' promises, Darling lent Biofilm $60,000; and Darling would not have lent Biofilm the $60,000 if he had known of defendants' actual intention not to honor their promises.

Responding to special interrogatories the jury found: (1) Wray on Biofilm's behalf entered a written contract with Darling to give Darling an option to buy Biofilm stock; (2) Wray and Biofilm breached the written contract made with Darling; (3) Wray on Biofilm's behalf intentionally misrepresented and therefore induced Darling to sign a termination of his written option; and (4) Wray's conduct on Biofilm's behalf in making the fraudulent misrepresentation to Darling constituted malice, fraud or oppression entitling Darling to punitive damages against Biofilm or Wray.

(i)

BIOFILM'S LIABILITY TO DARLING FOR COMPENSATORY DAMAGES

The jury awarded Darling $178,525 compensatory damages against Biofilm and $118,525 compensatory damages against Wray.

(a)

AMOUNT OF DARLING'S COMPENSATORY DAMAGES AGAINST BIOFILM

Asserting the $178,525 compensatory damages award appears to include $60,000 in damages not supported by the pleadings, evidence or instructions, Biofilm claims entitlement to a retrial on Darling's causes of action. *(Moore v. California State Bd. of Accountancy, supra,* 2 Cal.4th at p. 1024.) We disagree.

The evidentiary record showed: In October 1991 Darling lent Biofilm $60,000 for five years; in January 1992 Darling and Biofilm signed a written agreement memorializing that $60,000 loan and providing that Biofilm would give Darling on option to buy 25 percent of Biofilm's stock for $500; when Wray later applied for the SBA loan, the SBA told Wray that Darling would have to guarantee the SBA loan since under the written stock option Darling had a 25 percent share in Biofilm; hence, in June 1992 to facilitate the SBA loan approval, Darling at Wray's request signed a document releasing his written stock option; at the same time, Darling also signed a "standby agreement" with the

SBA, subrogating his $60,000 loan to the SBA loan so that Biofilm would not pay Darling until after the SBA loan was repaid; in, exchange for Darling's signing the document releasing his written stock option, Wray promised Darling that in about 30 days upon approval and funding of the SBA loan, Biofilm/Wray would reinstate Darling's written option for 25 percent of Biofilm's stock. However, Biofilm/Wray did not honor Wray's oral promise to reinstate Darling's written stock option agreement.

Biofilm acknowledges that Darling agreed to loan Biofilm $60,000 and later agreed (under the SBA "standby agreement") not to enforce Biofilm's repayment obligation on the $60,000 loan until after the SBA loan was repaid. However, Biofilm contends the only breach alleged and litigated by Darling was Biofilm's failure to give him 25 percent of Biofilm. Biofilm contends that not until closing argument did Darling ever claim the $60,000 was due and owing. Biofilm then contends that since Darling assertedly did not plead or litigate the claim to the $60,000, Darling's argument to the jury that he was entitled to return of the $60,000 was improper. Hence, Biofilm concludes including the $60,000 in the compensatory damages award favoring Darling against Biofilm was improper. The record belies Biofilm's contentions.

Darling's first amended complaint's cause of action for intentional misrepresentation alleged that at Biofilm/Wray's request Darling signed the document purporting to terminate his written stock option in return for Wray's promises that such document would not be enforced and that Darling's stock option would be replaced immediately after approval of the SBA loan; however, Biofilm/Wray later refused to acknowledge that Darling had any stock option; and if Darling had known defendants intended not to honor their promises, he would not have lent the $60,000. Such cause of action also incorporated an allegation that Darling "suffered direct, incidental, and consequential damages in an amount to be proven at time of trial."

At trial Darling presented evidence consistent with his pleadings. As discussed, the evidentiary record demonstrated that in June 1992 to facilitate the SBA loan approval, Darling at Wray's request signed a document releasing his written stock option; in exchange for Darling's signing the document releasing his written stock option, Wray promised Darling that in about 30 days upon approval and funding of the SBA loan, Biofilm/Wray would reinstate Darling's written option for 25 percent of Biofilm's stock; however, Biofilm/Wray did not honor Wray's oral promise to reinstate Darling's written stock option agreement.

Darling's counsel argued to the jury: "Now, the breach — there are two theories that Mr. Darling has concerning this agreement. One is breach of written contract. . . . [¶] But also we have an intentional misrepresentation theory that's been alleged on behalf of Mr. Darling. [¶] I think — of course, the 25 percent, the damages for Mr. Darling are going to be the 25 percent — value of the 25 percent ownership of the company, and then the $60,000 that he simply has never been paid that's hanging out there, that's been welshed on in the deal." The jury instructions stated Darling was "seeking damages based upon claims of breach of written contract and intentional misrepresentation." As part of its award of consequential damages for Biofilm's fraud, the jury could properly include the $60,000 Darling lent to Biofilm.

In sum, the record demonstrates that the $60,000 portion of the compensatory damages awarded Darling against Biofilm was well within the issues pleaded and submitted to the jury. *(Moore v. California State Bd. of Accountancy, supra*, 2 Cal.4th at p. 1024.)

(b)

LEGALITY OF DARLING-BIOFILM WRITTEN AGREEMENT

Biofilm contends its written contract with Darling was illegal as intended to defraud the SBA and thus not enforceable. *(Redke v. Silvertrust* (1971) 6 Cal.3d 94, 103-104; *Severance v. Knight-Counihan Co.* (1947) 29 Cal.2d 561, 568-570; § 3517.) Biofilm asserts the "foundation" of Darling's breach of contract and intentional misrepresentation claims was that he had a written agreement giving him a 25 percent option in Biofilm, that to "induce" the SBA to lend Wray $800,000 for Biofilm's benefit Darling would "pretend" to release his option in Biofilm for $1, and Darling would not have to sign a guarantee of the SBA loan. Further, Biofilm asserts that Darling claimed the "real deal" was that Darling's option would be reinstated when the SBA loan was funded. Biofilm thus characterizes Darling's claim to be that Darling "had an agreement with Biofilm to defraud the SBA into thinking that only Wray had a shareholder interest in Biofilm, so that only Wray would have to guaranty the $800,000 loan; as Darling would have it, however, Darling would continue to have an option for a 25% interest in Biofilm, but would not have to give the SBA his personal guarantee." Hence, Biofilm concludes Darling sought damages based on an "illegal" agreement to defraud a federal lender.

However, contrary to Biofilm's mischaracterization, the "gist" of Darling's breach of contract cause of action did not involve the SBA loan. Instead, Darling alleged that Biofilm breached the January 1992 written agreement by not providing Darling with a written option to buy 25 percent of Biofilm or, alternatively, not conveying to Darling 25 percent of Biofilm's stock. Hence, Darling simply sought to enforce the January 1992 written agreement. As part of Darling's proof of Biofilm's breach of the January 1992 written agreement, Darling essentially sought to show that at Biofilm's request he executed the document for the SBA purportedly terminating the stock option portion of such agreement but the termination document was not enforceable against Darling since it was actually part Biofilm's scheme to defraud Darling of his interest in the corporation.

In any event, the special interrogatories did not ask the jury to determine whether the contract between Darling and Biofilm was illegal. Hence, to the extent Biofilm asserted the defense of illegality, we must presume the jury rejected any such defense. Moreover, the jury specifically found that although Biofilm and Wray acted with unclean hands, Darling did not. In effect, Biofilm improperly seeks reweighing on appeal of the evidence presented at trial.

(c)

DARLING'S INTENTIONAL MISREPRESENTATION CLAIM AGAINST BIOFILM

Biofilm contends Darling's intentional misrepresentation claim was a "putative tort superimposed on an alleged breach of contract" and thus no longer valid under *Freeman & Mills, Inc. v. Belcher Oil Co., supra*, 11 Cal.4th at pages 93-95, and *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515, 517. However, Darling's intentional fraud claim was based not on an ordinary breach of contract but instead on the tort of false promise. (§§ 1709, 1710, subd. 4.) We find nothing in the cases cited by Biofilm suggesting such tort no longer exists. On the contrary, those cases expressly acknowledge conduct amounting to a breach of contract becomes tortious where, as here, "it also violates an independent duty arising from principles of tort law." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, at p. 515; cited with approval *Freeman & Mills Inc. v. Belcher Oil Co., supra*, at p. 102.)

In sum, Darling could properly recover from Biofilm on the independent tort theory that Biofilm made false promises to induce Darling to enter the parties' written agreement.

(ii)

DARLING'S ENTITLEMENT TO PUNITIVE DAMAGES FROM BIOFILM

The court awarded Darling $12,500 punitive damages against Biofilm. Biofilm attacks that award.

(a)

DARLING'S UNDERLYING FRAUD CLAIM

Biofilm contends Darling's intentional misrepresentation cause of action was inadequate to support punitive damages as assertedly simply a breach of illegal contract claim "masquerading" as a tort. However, as discussed, Darling was entitled to recovery from Biofilm on the independent tort theory of intentional misrepresentation through false promise. (§§ 1709, 1710, subd. 4; *Freeman & Mills, Inc. v. Belcher Oil Co., supra*, 11 Cal.4th at p. 102; *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd., supra*, 7 Cal.4th at p. 515.)

(b)

LANGUAGE OF JURY RESPONSE TO SPECIAL INTERROGATORIES

Responding to special interrogatories the jury found Wray on Biofilm's behalf intentionally misrepresented and therefore induced Darling to sign a termination of his written option; and Wray's conduct on Biofilm's behalf in making the fraudulent misrepresentation to Darling constituted malice, fraud or oppression entitling Darling to punitive damages against Biofilm "or" Wray. In addition to awarding Darling $12,500 punitive damages against Biofilm, the court also awarded Darling $12,500 against Wray.

Characterizing the punitive damages special interrogatory's use of the disjunctive "or" as "legally and linguistically flawed," Biofilm contends there was no finding of malice, fraud, or oppression against Biofilm. (§ 3294, subd. (a).) However, by focusing on only one word Biofilm mischaracterizes the reasonable meaning of the special interrogatory when read as a whole. Although the last phrase of the special interrogatory used the disjunctive "or," the preceding portion was a specific finding that Wray's conduct on *Biofilm's behalf* in making the fraudulent misrepresentation to Darling constituted malice, fraud or oppression. Reasonably read, such language amounted to a finding of malice, fraud or. oppression against Biofilm as well as against Wray.

In sum, since Biofilm through Wray made the fraudulent misrepresentation with malice, fraud or oppression, Darling was properly awarded punitive damages against Biofilm.

(C)

BSH v. BIOFILM

BSH sued Wray and Biofilm as transferees of the fraudulent conveyance of Astro-Lube's assets. BSH proceeded against Wray and Biofilm for fraudulently transferring Astro-Lube's assets, conspiring to engage in fraudulent transfer of assets, conspiring to breach fiduciary duty and conspiring to engage in constructive fraud.

BSH's complaint alleged BSH was Astro-Lube's judgment creditor and owned 5 percent of Astro-Lube's stock; Astro-Lube's assets were transferred to Biofilm to hinder BSH's collection of the Los Angeles judgment; Biofilm paid inadequate consideration for those assets, thus transforming

Astro-Lube into an empty shell unable to satisfy its liabilities; the purchase price paid by Biofilm was not a reasonably equivalent value in exchange for Astro-Lube's assets; as Astro-Lube's directors and officers, Boynton/Darling/Stoughton had the "fiduciary obligation to refrain from appropriating the assets of Astro-Lube for their own personal use and to the detriment of [BSH] in its capacity as a shareholder and creditor of Astro-Lube"; as repositories of BSH's trust and confidence, Boynton/Darling/Stoughton "owed a fiduciary duty to act with undivided loyalty to [BSH] and not act in a manner adverse to [BSH's] interests"; BSH reasonably relied on Boynton/Darling/Stoughton to protect BSH's interests as a "shareholder and creditor" of Astro-Lube; and Wray and Biofilm conspired with Boynton/Darling/Stoughton/Astro-Lube to breach such fiduciary duties and engage in constructive fraud by causing the transfer of Astro-Lube's assets to Biofilm without adequate consideration and for the purpose of hindering BSH's collection of the Los Angeles judgment.

Responding to special interrogatories the jury found Astro-Lube transferred its assets with the actual intent to hinder, delay or defraud its creditors including BSH; Astro-Lube transferred assets to Biofilm and Wray without receiving reasonably equivalent value in exchange; the total value of assets transferred by Astro-Lube to Biofilm and Wray at the time of transfer was $862,000; Biofilm and Wray conspired with Boynton and others to transfer Astro-Lube's assets with the actual intent to hinder, delay, or defraud Astro-Lube's creditors including BSH; Biofilm and Wray conspired with Boynton and others to cause Astro-Lube to transfer its assets without receiving reasonably equivalent value in exchange; Boynton and Darling breached their fiduciary duties owing to BSH; Biofilm and Wray conspired with Boynton to breach-fiduciary duties they owed to BSH; Boynton engaged in acts of constructive fraud intended to deceive BSH; Biofilm, Wray, Boynton and Darling had a confidential/fiduciary relationship with BSH and conspired with others to engage in acts of constructive fraud intended to deceive BSH; with respect to conspiracy to breach fiduciary duty and conspiracy to engage in constructive fraud, the conduct of Biofilm and Wray constituted malice, fraud or oppression entitling BSH to punitive damages; and Biofilm and Wray had unclean hands while Boynton and Darling did not.

The jury awarded BSH $685,621 compensatory damages against Wray and $685,621 compensatory damages against Biofilm. In its judgment, the court awarded BSH $685,621 compensatory damages against Wray. Applying the alter ego doctrine, the court also awarded BSH $685,621 compensatory damages against Biofilm and Wray jointly and severally.

(i)

BIOFILM'S LIABILITY TO BSH FOR COMPENSATORY DAMAGES

(a)

BIOFILM CONSPIRED TO BREACH FIDUCIARY DUTY AND ENGAGE IN CONSTRUCTIVE FRAUD AGAINST BSH

Biofilm attacks as without substantial evidentiary support the portions of the judgment imposing liability on Biofilm for conspiring to breach fiduciary duty and conspiring to engage in constructive fraud against BSH. Asserting it did not owe BSH any fiduciary duty, Biofilm contends as a matter of law it could not be liable for conspiring to breach fiduciary duty. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at pp. 511-514; *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44; *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1597.) Asserting it had no dealings with BSH, was not the repository of BSH's trust, and never obtained control over BSH's affairs, Biofilm contends it did not owe any fiduciary duty to BSH as Astro-Lube's creditor. (*Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 809.)[14] Biofilm thus contends as a matter of law it could not be liable for conspiring to engage in constructive fraud against BSH since assertedly only a fiduciary can engage in constructive fraud. (*Kidron v. Movie Acquisition Corp., supra,* at p. 1598.)[15]

Citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra,* 7 Cal.4th 503, the appellate court in *Kidron v. Movie Acquisition Corp., supra,* 40 Cal.App.4th 1571, stated the general rule that a "nonfiduciary cannot conspire to breach a duty owed only by a fiduciary." (*Id.* at p. 1597.)[16] However, in *Doctors' Co. v. Superior Court, supra,* 49 Cal.3d 39, the Supreme Court recognized an exception to the general rule, observing that a nonfiduciary may be held liable for conspiring with a fiduciary to breach fiduciary duties where, as here, the nonfiduciary acts in furtherance of its own financial gain. (*Id.* at p. 47.) Discussing earlier case law, the Supreme Court stated: "In each of those cases a plaintiff, defrauded by means of one defendant's violation of a fiduciary duty, was allowed to recover against another defendant who, though not subject to the fiduciary duty, had conspired in the fraud. Since the nonfiduciary defendants had acted not simply as agents or employees of the fiduciary defendants but rather in furtherance of their own financial gain, they could not have been relieved from liability . . . . (*Ibid.*) We find nothing in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra,* disapproving the exception recognized in *Doctors' Co. v. Superior Court, supra.* By joining in a majority with other shareholders of Astro-Lube, Astro-Lube shareholder Wray was charged with fiduciary duties toward minority shareholder BSH. (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108.)[17] Biofilm was properly held liable for conspiring with Astro-Lube and its majority shareholders to breach those fiduciary duties since Biofilm acted for its own financial gain in receiving Astro-Lube's tangible assets. (*Doctors' Co.* v. *Superior Court, supra,* at p. 47.)

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[14] In *Lynch v. Cruttenden & Co., supra,* 18 Cal.App.4th 802, the appellate court stated: "A fiduciary relationship is created where a person reposes trust and confidence in another and the person in whom such confidence is reposed obtains control over the other person's affairs. (Citation.]" (*Id.* at p. 809.)

[15] In *Kidron v. Movie Acquisition Corp., supra,* 40 Cal.App.4th 1571, the appellate court stated: "A nonfiduciary as well as a fiduciary owes a duty not to engage in *actual* fraud, but only a fiduciary owes a duty not to engage in *constructive* fraud. 'Constructive fraud allows conduct insufficient to constitute actual fraud to be treated as such where the parties stand in a fiduciary relationship.' (Citations.] Accordingly, a party who is not in a fiduciary relationship with the plaintiff cannot be held liable for conspiracy to commit constructive, as opposed to actual fraud. [Citations.]" (*Id.* at pp. 1597-1598, italics in original.)

[16] The trial court instructed the jury on the general rule: "In order for an alleged conspirator to be liable for conspiracy to breach fiduciary duties, the alleged conspirator must personally owe a fiduciary duty to the party asserting liability."

In sum, since Wray and his co-conspirators controlled Astro-Lube, they owed fiduciary duties to minority shareholder BSH. The majority shareholders breached their fiduciary duties to BSH by crafting and implementing a plan resulting in the fraudulent transfer of Astro-Lube's assets to Biofilm and Wray, thus transforming Astro-Lube into an empty shell. Biofilm acted in concert with the majority Astro-Lube shareholders to benefit itself alone in a manner detrimental to minority shareholder BSH. Hence, Biofilm was properly held liable for conspiring with Astro-Lube and its majority shareholders to breach fiduciary duty. *(Doctors' Co.* v. *Superior Court, supra*, 49 Cal.3d at p. 47.) Moreover, since the facts here indicated express misrepresentation, active concealment and suppression, BSH's claim for conspiracy to breach fiduciary duty was tantamount to a claim for conspiracy to commit actual fraud in violation of statutory duty. (§§ 1709, 1710, subd. 4.) Under these circumstances, nonfiduciary Biofilm could be held liable for conspiracy even without application of the exception recognized in *Doctors' Co.* v. *Superior Court, supra.* (Cf. *Kidron* v. *Movie Acquisition Corp., supra,* 40 Cal.App.4th at p. 1598; *Younan* v. *Equifax Inc.* (1980) 111 Cal.App.3d 498, 512.)[18]For similar reasons, Biofilm was also properly held liable for acting to benefit himself in conspiring with Astro-Lube and its majority shareholders to engage in constructive fraud involving those fiduciaries' failure to disclose facts they were bound to disclose to BSH. (*Doctors' Co.* v. *Superior Court, supra,* 49 Cal.3d at p. 47.) Moreover, on this record of express misrepresentation, active concealment and suppression, BSH's claim for conspiracy to commit constructive fraud amounted to a conspiracy to commit actual fraud in violation of statutory duty.

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[17] In *Jones v. H. F. Ahmanson & Co., supra,* 1 Cal.3d 93, the Supreme Court observed that "majority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner." (*Id.* at p. 108.) The court also stated that "when a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders.'" (*Id.* at pp. 110-111.)

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[18] In *Younan* v. *Equifax Inc., supra,* 111 Cal.App.3d 498, the appellate court stated: "Although mere nondisclosure is not ordinarily actionable unless the defendant is a fiduciary with a duty to disclose, active concealment or suppression of facts by a nonfiduciary is the equivalent of a false representation, i.e., *actual fraud.* [Citation.]" (*Id.* at p. 512, italics in original.)

In *Kidron* v. *Movie Acquisition Corp., supra,* 40 Cal.App.4th 1571, the appellate court indicated a "conspiracy-to-breach-fiduciary-duty claim" identical to a claim for conspiracy to commit actual fraud would "duplicate" a "conspiracy-to-defraud claim" and have "no independent significance." (*Id.* at p. 1598.)

(§ 1709, 1710, subd. 4.) Under these circumstances, nonfiduciary Biofilm could be held liable for conspiracy even without application of the exception recognized in *Doctors' Co.* v. *Superior Court, supra.*(Cf. *Kidron* v. *Movie Acquisition Corp., supra,* 40 Cal.App.4th at p. 1598; *Younan* v. *Equifax Inc., supra,* 111 Cal.App.3d at p. 512.)

(b)

MEASURE OF BSH'S COMPENSATORY DAMAGES AGAINST BIOFILM

Responding to special interrogatories the jury found the total value of assets transferred by Astro-Lube to Biofilm and Wray at the time of transfer was $862,000. The jury's general verdict awarded BSH $685,621 compensatory damages against Wray and $685,621 compensatory damages against Biofilm. Consistent with the general verdict, the court's judgment awarded BSH $685,621 compensatory damages against Wray. Applying the alter ego doctrine, the court also awarded BSH $685,621 compensatory damages against Biofilm and Wray jointly and severally. Hence, BSH was awarded a total of $1,371,242 compensatory damages.

At trial BSH pursued statutory claims for money damages against Biofilm for actual fraud (§ 3439.04, subd. (a)) and constructive fraud (§§ 3439.04, subd. (b), 3439.05).[19] BSH also pursued causes of action for conspiracy to breach fiduciary duty and conspiracy to engage in constructive fraud. In its opening brief Biofilm, asserted that BSH's total compensatory damage award against Biofilm and Wray together should have been limited to no more than the $862,000 expressly found by the jury to be the value of all transferred assets at the time of the transfer (§ 3439.08, subds. (b) & (c)).[20] However, in its reply brief Biofilm acknowledges that "[s]ince the jury determined that the value of the assets transferred to Biofilm and Wray together, at the time-of the transfer was $862,000, for BSH to be entitled to the damage award it received, it must demonstrate[] that it had some cause of action against Biofilm other than one based on the Fraudulent Transfer Act." As discussed, Biofilm was properly held liable to BSH for conspiracy to breach fiduciary duty and conspiracy to engage in constructive fraud. Since remedies and measures of damages under the FTA were not exclusive (§ 3439.10; *Monastra v. Konica Business Machines, U.S.A., Inc.* (1996) 43 Cal.App.4th 1628, 1639-1640),[21] damages were properly assessed against Biofilm on the tort theories of conspiracy under tort measures of damages (§ 3333).[22] Damages properly awarded on BSH's tort theories included the $165,000 portion of the Los Angeles judgment representing past commissions plus recovery for future commissions on sales on various accounts through the year 2001 no longer collectible from Astro-Lube by BSH due to the actions of Biofilm.

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[19] Section 3439.04 provides:

"A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

"(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

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[20] Section 3439.08, subdivision (b), provides in relevant part: "Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under paragraph (1) of subdivision (a) of Section 3439.07, *the creditor may recover judgment for the value of the asset transferred, as adjusted under subdivision (c), or the amount necessary to satisfy the creditor's claim, whichever is less.*" (Italics added.) Biofilm acknowledges that at trial BSH presented evidence and argued that the amount necessary to satisfy BSH's claim as a judgment creditor was $1,841,994 to $2,573.420.

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[21] Section 3439.10 provides: "Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions." Citing section 3439.10, the appellate court noted in *Monastra* v. *Konica Business Machines, U.S.A., Inc., supra,* 43 Cal.App.4th 1628: "[T]he current Fraudulent Transfer Act provides that, unless otherwise expressly provided by statute, other laws of whatever kind which apply to transactions also covered by the Fraudulent Transfer Act *supplement* that act and do not supplant or supersede it." (*Id.* at p. 1639, italics in original.) Nothing in the FTA limits the measure of damages available to a plaintiff who also successfully prosecutes an action on the common law theories of conspiring to breach fiduciary duty or conspiring to engage in constructive fraud.

[22] Section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Section 3333 provides the measure of damages for various torts including breach of fiduciary duty. (*Pollack* v. *Lytle* (1981) 120 Cal.App.3d 931, 941; *Pepitone* v. *Russo* (1976) 64 Cal.App.3d 685, 688-690.)

In sum, the-trial court properly awarded BSH total compensatory damages against Biofilm and Wray together in an amount exceeding the jury-determined value of the transferred assets.[23]

(ii)

BSH'S ENTITLEMENT TO PUNITIVE DAMAGES AGAINST BIOFILM

Responding to special interrogatories the jury found Biofilm's conduct in conspiring to breach fiduciary duty and conspiring to engage in constructive fraud constituted malice, fraud, or oppression entitling BSH to an award of punitive damages. The court awarded BSH punitive damages of $450,000 against Biofilm.

Biofilm contends BSH was not entitled to punitive damages since the findings that Biofilm engaged in the conspiracies forming the basis for such damages assertedly lacked support in fact or law. However, as discussed, the court properly entered judgment favoring BSH against Biofilm for conspiring to breach fiduciary duty and conspiring to engage in constructive fraud. Hence, in light of the jury's finding that Biofilm's actions in committing such misconduct constituted fraud, oppression or malice, imposition of punitive damages favoring BSH against Biofilm was proper.

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[23] In light of Biofilm's reply brief's acknowledgment that BSH would "be entitled to the damage award it received" by demonstrating Biofilm's liability on a cause of action other than one based on the FTA, we need not reach Biofilm's appellate brief's contention that BSH was collaterally estopped to assert the total value of the transferred assets at time of transfer was more than $375,000, the value of Astro-Lube's assets used by the Los Angeles court in January 1992 to set an appellate bond in, BSH's litigation against Astro-Lube.

3

REASONABLE PUNITIVE DAMAGES ASSESSED AGAINST BIOFILM

Biofilm contends the superior court impermissibly imposed the assertedly excessive amount of $462,501 total punitive damages against Biofilm favoring Boynton, Darling, and BSH.[24] Biofilm asserts the superior court disregarded established legal standards in arriving at that amount.

A punitive damage award may be "so disproportionate to the defendant's ability to pay" as to be deemed "excessive *for that reason alone.*" (*Adams v. Murakami* (1991) 54 Cal.3d 105, 111, italics in original; accord, *Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1410; *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 57; *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 18.) "[T]he function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) In *Kenly v. Ukegawa, supra*, we stated that "a defendant's financial status must be shown because the purpose of the award 'is to deter, not destroy' [Citation.] [¶] We are convinced that in most cases there must be evidence of the defendant's net worth in order to support the punitive damage award." (*Id.* at p. 57, fn. omitted.)

Biofilm asserts at the time of the punitive damages trial it had a current negative net worth of $904,348. Biofilm also asserts that at the time of the punitive damages trial it could not meet other financial obligations. However, the record indicates the superior court followed established legal standards in assessing the amount of punitive damages to be imposed on Biofilm.[25] Further, Biofilm has not cited the evidence relied upon by the court in reaching that amount.[26]

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[24] As discussed, the judgment must be modified to delete Boynton's $1 punitive damage award against Biofilm individually.

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[25] In announcing its determination of the amount of punitive damages to be assessed against defendants, the superior court noted the "wide variety of information" presented with regard to defendants' wealth. Referring to its review of various cases including *Adams v. Murakami, supra*, 54 Cal.3d 105; *Kenly v. Ukegawa, supra*, 16 Cal.App.4th 49; and *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, the court stated: "[I]t is clear to me that what needs to be done with regard to wealth is to make a determination based in essence on some sort of balance sheet analysis. [¶] You have to take into consideration liabilities. It is also clear to me that you cannot focus on any one particular aspect. You must take all of the information together."

[26] The court stated: "[C]ertainly it is clear to me that this company, absent excessive attorney's fees it has been paying, is a viable company. It is making anywhere between 2.4 to 2.6 million in sales a year." The court also stated: "Absent this litigation, it could be a very profitable company. But I still must take into consideration the liabilities, the current liabilities, i.e., the current financial status of the defendants. That's what the cases teach me. [¶] Let the record be very clear for any reviewing court that I'm not focusing on any one particular aspect whatsoever. I'm not focusing on the sales of up to 2.6 million, I'm not focusing on the various opinions of the experts. [¶] For example, Mr. Wallace, the company Biofilm is worth anywhere between five to seven million dollars. [¶] Mr. Jenkins, anywhere between 5.3 to 11.5 million. [¶] Mr. Brinig, worth $830,000. [¶] Nor am I focusing only on an indicated offer from Lake Pharmaceutical of two-and-a-half million. [¶] What I'm doing is taking all of that information and trying to look at it in terms of the defendant's current financial status. [¶] In that regard, we certainly have Biofilm's balance sheet analysis, and in that balance sheet analysis, the balance put on certain items may not be the exact value. [¶] Therefore, it is my obligation as the trier of fact, to take all of the other information that I have before me in order to interpret that balance sheet. [¶] Let me make it very clear for the record that I don't believe the balance sheets as prepared for Biofilm or Mr. Wray are true, exact and accurate. Their method may have been in accordance with

Such evidence indicated Wray's net worth was at least $5,289,000; Wray was the sole owner of the intellectual property rights to Astroglide, Biofilm's only product; and Wray was the sole owner of his alter ego Biofilm, shown by evidence to have a minimum net worth between $5 million and $7 million. Based upon such substantial evidence, the court assessed $462,501 total punitive damages against Biofilm favoring BSH, Boynton and Darling. Such punitive damages were less than 10 percent of Biofilm's net worth.

In sum, on this record the total punitive damages award against Biofilm was not excessive. (See e.g., *Wollersheim v. Church of Scientology* (1989) 212 Cal.App.3d 872, 906; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 391; *Schomer v. Smidt* (1980) 113 Cal.App.3d 828, 836.)

B

WRAY'S APPEAL

1

RIGHT TO COUNSEL

Wray claims entitlement to a new trial on the ground the superior court denied him the right to counsel of his choice by forcing assertedly incompetent and inexperienced Attorney Moore to conduct the trial. (*Kim v. Orellana, supra,* 145 Cal.App.3d at pp. 1027-1028.) Specifically, Wray faults the court for denying him a brief continuance to engage competent counsel upon Huiskamp's sudden withdrawal due to illness despite the assertedly uncontroverted evidence of Moore's incompetence/inexperience and without a showing a continuance would prejudice plaintiffs. However, the superior court did not deny Wray his right to counsel of his choice.

In denying Wray's motion for continuance upon Huiskamp's withdrawal, the superior court concluded Wray did not show good cause to continue the matter "for any material or substantial period of time." The court noted Moore had been involved for a substantial time with the facts of the cases in the discovery process and in assisting Attorney Boxer; both Wray and Biofilm originally retained Boxer and Moore; Moore was associated in with the consent of Wray and Biofilm in August 1993 and was currently representing the defendants; the pleadings indicated Boxer and Moore were trial counsel until March 1995; and it was intended that Moore was to assist Huiskamp in trying the case.

Citing section 9(2)(ii) of the Standards of Judicial Administration, Wray asserts Huiskamp's illness constituted good cause for a continuance. However, as discussed, that section also provides that when trial counsel is ill, the court "in lieu of a continuance" should consider substituting another attorney "depending on the proximity of the illness to the date of the trial, the anticipated duration of the incapacity, the complexity of the case, and the availability of a substitute attorney . . . . (*Ibid.*) Here, the superior court properly denied the defense request for continuance upon Huiskamp's withdrawal for illness since Moore remained available as counsel for Wray. As the superior court found, Moore had participated in the litigation including depositions from almost its outset and was concurrently acting as counsel of record for Wray. Further, the rapid association of Petty's firm for co-defendant Biofilm immediately after denial of the continuance indicated other capable lawyers were available on short notice. Moreover, the court did not force Wray to accept Moore as his trial counsel. Neither did the court preclude Wray from substituting another attorney as counsel of record in place of Moore. Instead, the court simply permitted Moore to continue his representation of Wray dating back to soon after the litigation's inception. Finally, nothing in the record indicates that Wray made any attempt to replace Moore until finally substituting McIntyre following the jury's verdict and discharge.

In sum, on this record the superior court acted within its discretion in denying Wray's motion for continuance upon Huiskamp's withdrawal.

2

THEORIES OF LIABILITY

Wray contends the superior court erred in entering judgment against Wray on causes of action never asserted against him and on factually and legally "impossible" theories.

(A)

BOYNTON v. WRAY

Boynton's first amended complaint alleged Wray breached his 1991 oral contract with Boynton by not paying Boynton specified royalties and by not giving Boynton an option to buy 75 percent of Biofilm for $1,500; Wray in bad faith denied the existence of such oral contract; and Wray made an intentional misrepresentation by falsely promising to pay Boynton royalties and transfer Biofilm stock to Boynton in return for Boynton's conveying Astro-Lube's assets to Biofilm.

Responding to special interrogatories the jury found that (1) Wray and Boynton entered into an oral contract for an option to buy stock in Biofilm and for the payment of a royalty to Boynton; the oral contract did not have a lawful objective; and Boynton was not less at fault than Wray;

(2) Wray denied the existence of his oral contract with Boynton without cause to do so;[27] (3) Wray intentionally misrepresented to Boynton that he would pay a royalty to Boynton and that he would give Boynton an option to buy stock in Biofilm; and (4) Wray's conduct in making a fraudulent misrepresentation to Boynton constituted malice, fraud or oppression entitling Boynton to punitive damages against Wray.

The jury's general verdict found Wray liable to Boynton for $274,316 compensatory damages. The court entered judgment awarding Boynton $274,316 compensatory damages against Wray individually. Applying its alter ego finding, the court entered judgment awarding Boynton $118,525 compensatory damages against Biofilm and Wray jointly and severally.[28]

(i)

WRAY'S LIABILITY TO BOYNTON FOR COMPENSATORY DAMAGES

Wray contends the superior court erred in entering judgment favoring Boynton against Wray for breaching their oral contract by not giving Boynton his royalty or his 75 percent interest in Biofilm.

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[27] As noted the parties agree the portions of the judgment imposing liability on Biofilm and Wray for bad faith denial of the existence of the oral contract with Boynton must be reversed since no such tort exists after *Freeman & Mills, Inc. v. Belcher Oil Co., supra*, 11 Cal.4th at page 102. However, as also noted, reversal of those portions of the judgment does not undermine the general verdict here.

[28] As discussed, the portions of the judgment favoring Boynton against Biofilm and Wray must be modified to provide simply that Boynton is awarded $274,317 against Biofilm and Wray jointly and severally, consisting of $274,316 compensatory damages and $1 punitive damages.

(a)

ILLEGALITY OF BOYNTON-WRAY ORAL CONTRACT

Wray contends his oral contract with Boynton was unenforceable since the jury found (1) the contract did not have a lawful objective and was illegal; and (2) with respect to such illegal contract Boynton was not less at fault than Wray. (*Redke v. Silvertrust, supra*, 6 Cal.3d at pp. 103-104; *Severance v. Knight-Counihan Co., supra*, 29 Cal.2d at pp. 567-570; § 3517.) According to Wray, since the jury found the parties' oral contract had the unlawful objective of defrauding creditors and Boynton was at least as much at fault as Wray, as a matter of law Boynton was not entitled to any relief from Wray on his claim for breach of such contract.

However, the cases relied upon by Wray to bar recovery are not controlling because in addition to finding that Boynton was not less at fault than Wray with respect to the parties' illegal contract, the jury made a special finding that Wray had unclean hands but Boynton did not. The jury also specially found that Wray intentionally misrepresented to Boynton that Wray would pay Boynton a royalty; Wray intentionally represented to Boynton that he would give Boynton an option to buy stock in Biofilm; and Wray's conduct in making a fraudulent misrepresentation to Boynton constituted malice, fraud or oppression. Hence, as we shall explain, since Wray was more culpable, he was properly held liable to Boynton.

Various cases involving the doctrine of in pari delicto have indicated that a person who is party to an illegal transaction may nonetheless obtain relief from another party who is more at fault. (See e.g., *Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 218; *Severance v. Knight-Counihan Co., supra*, 29 Cal.2d at p. 569; *Jacobs v. Universal Development*

Corp. (1997) 53 Cal.App.4th 692;[29] *Samuelson v. Ingraham* (1969) 272 Cal.App.2d 804, 807; *Norwood v. Judd* (1949) 93 Cal.App.2d 276, 288-289; *Sontag v. Denio* (1937) 23 Cal.App.2d 319, 323; *Chamberlain v. Chamberlain* (1908) 7 Cal.App. 634, 639.)

In *Norwood v. Judd, supra*, 93 Cal.App.2d 276, the appellate court acknowledged that "[t]he rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated on sound public policy." (*Id.* at pp. 288-289.) However, the appellate court cautioned that "courts should not be so enamored with the Latin phrase *'in pari delicto'* that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered." (*Id.* at p. 289.) The appellate court stated the rule should not be applied "where the defendant is the one guilty of the greatest moral fault" or "where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff . . . . *(Ibid.)* Citing *Norwood v. Judd, supra*, the Supreme Court has observed: "These rules are intended to prevent the guilty party from reaping the benefit of his wrongful conduct, or to protect the public from the future consequences of an illegal contract. They do not necessarily apply to both parties to the agreement unless both are truly *in pari delicto. (Tri-Q, Inc. v. Sta-Hi Corp., supra,* 63 Cal.2d at p. 218.)

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[29] In *Jacobs v. Universal Development Corp., supra*, 53 Cal.App.4th 692, we observed: "In pari delicto means, '[i]n equal fault; equally culpable or criminal; in a case of equal fault or guilt.' [Citation.] According to Witkin, '*[h]e who comes into equity must come with clean hands.* A court will neither aid in the commission of a fraud by enforcing a contract, nor relieve one of two parties to a fraud from its consequences, where both are *in pari delicto.*' [Citation.] The doctrine ' "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.' " [Citation.] 'In California, the doctrine of unclean hands may apply to legal as well as equitable claims [citation] and to both tort and contract remedies. [Citations.]' [Citation.]" (*Id.* at p. 699, italics in original.)

Hence, if the facts showed that Boynton was "in *delicto,* but not *pari delicto,* his guilt will not prevent him from obtaining equitable relief." *(Samuelson v. Ingraham, supra,* 272 Cal.App.2d at p. 807.) Wray could not "lay a trap" for Boynton and then retain the "fruits of his perfidy." *(Chamberlain v. Chamberlain, supra,* 7 Cal.App. at p. 639; cited with approval *Severance v. Knight-Counihan Co., supra,* 29 Cal.2d at p. 569.) In *Chamberlain v. Chamberlain, supra,* the appellate court stated: "A cannot lay a trap for B, secure his confidence, induce him to make a conveyance of his property in the expectation that it will be returned, and thereafter retain the fruits of his perfidy on the ground that B too readily yielded to temptation to save himself at the possible expense of creditors. The greater offense of the tempter overshadows and renders innocuous the weakness of the one of whom advantage is taken." (*Id.* at p. 639.) Citing such language with approval, another court stated: "In other words, proof [of] a transfer of property in order to conceal it from creditors of the transferor does not necessarily bar a recovery of such property from the transferee or his assigns." *(Samuelson v. Ingraham, supra,* at pp. 807-808.)

By general verdict the jury awarded Boynton $274,316 compensatory damages against Wray. In essence, Wray seeks to overturn the general verdict by asserting that within the meaning of Code of Civil Procedure section 625, the general verdict was fatally inconsistent with the special finding that Boynton was not less at fault than Wray.[30] However, "[i]n determining the existence and effect of inconsistencies between general and special verdicts under section 625, we are governed by well settled principles." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540, disapproved on another point *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) In Hasson, the Supreme Court observed: "Since the special verdict or finding provided for in section 625 is '. . . primarily and principally for the purpose of determining whether the general verdict is or is not against law' (citation], no presumption is to be indulged in favor of answers to special interrogatories and every reasonable intendment in favor of the general verdict is indulged. (Citations.]" (*Ibid.*) The Supreme Court stated that to be fatally inconsistent under Code of Civil Procedure section 625 the "general and special verdicts must be beyond possibility of reconciliation under any possible application of the evidence and instructions. If any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have drawn them. [Citations.] [¶] Moreover, a special verdict can control the general only by its inherent force and clarity. Hence, it has been held that if inconsistent *special* findings are rendered, one of which supports, and the other of which tends to negate, the general verdict, the latter will stand. (Citation-]" (*Id.* at pp. 540-541, italics-in original.) Further," ' " . . . all parts of the verdict are to be reconciled in support [of the general verdict] if it can reasonably be done.

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[30] Code of Civil Procedure section 625 provides in relevant part: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. . . . . Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."

Hence, the general verdict will stand unless the facts found by the jury in answer to special interrogatories are so clearly antagonistic to it as to be absolutely irreconcilable, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues, so that both the general verdict and special findings cannot stand." [Citations.] . . . '[Citation]" (*Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal.App.3d 668, 689-690.)

Viewed under those standards, the evidence shows that although the parties were equally at fault in forming a contract for the purpose of defrauding creditor BSH, Wray's conduct in defrauding Boynton by falsely promising to perform the contract perpetrated another injustice, this time against Boynton. Stated otherwise, after Wray and Boynton illegally agreed to take actions harmful to BSH, Wray went one step farther by taking actions designed to harm Boynton as well. Further, such interpretation is supported by the jury instructions.

Specifically, the trial court told the jury: "A contract that is illegal may not be enforceable. If you find there is a contract and that the contract exists for an unlawful purpose, you may consider whether or not to award any damages for the breach of that contract." Taking its cue from *Chamberlain v. Chamberlain, supra*, 7 Cal.App. at page 639, the trial court also told the jury: "The law is more indulgent to human infirmity and less tolerant of deliberate and obtrusive depravity. For example, A cannot lay a trap for B, secure his confidence, induce him to make a conveyance of his property in the expectation that it will be returned, and thereafter retain the fruits of his breach of loyalty and treachery on the ground that B too readily yielded to temptation to save himself at the possible expense of creditors. The greater offense of the tempter overshadows and renders harmless the weakness of the one of whom advantage is taken."

In sum, Boynton's transfer of property to conceal it from creditor BSH did not necessarily bar recovery from transferee Wray. (*Samuelson v. Ingraham, supra,* 272 Cal.App.2d at pp. 807808.) Hence, the jury acted in accord with the evidence and the law in properly concluding that although illegal the Boynton-Wray oral contract nonetheless formed a proper basis for recovery by Boynton since Wray's hands were dirtier than Boynton's.

(b)

WRAY'S FALSE PROMISE TO BOYNTON

Asserting there is no tort recovery for non-insurance contract breach (*Freeman & Mills, Inc. v. Belcher Oil Co., supra,* 11 Cal.4th at p. 102), Wray contends the superior court erred in entering judgment favoring Boynton against Wray for intentional misrepresentation assertedly based on the same facts as the claimed breach of Wray's oral promise to give Boynton royalties and a stock option in return for Boynton causing Astro-Lube to transfer assets to Biofilm. Wray asserts Boynton's first amended complaint and the jury instructions prepared by Boynton indicated that Boynton's intentional misrepresentation claim was no more than a claim for breaching such assertedly illegal contract. Wray further contends Boynton did not present substantial evidence demonstrating Wray's alleged intent, justifiable reliance by Boynton, or resulting damages. (*Bondi v. Jewels By Edwar, Ltd.* (1968) 267 Cal.App.2d 672, 677.)

However, as discussed, the Boynton-Wray oral contract — though illegal as not made for a lawful objective — nonetheless formed a proper basis for recovery by Boynton. Further, as pleaded, litigated, proven, and decided based on substantial evidence and reasonable inferences, Boynton's intentional misrepresentation claim was based not on an ordinary breach of contract but instead on the tort of false promise. (§§ 1709, 1710, subd. 4.) Moreover, contrary to Wray's contention, nothing in *Freeman & Mills Inc. v. Belcher Oil Co., supra,* 11 Cal.4th 85, suggests such tort no longer exists. On the contrary, that case expressly acknowledges that conduct amounting to a breach of contract becomes tortious where, as here, "it also violates an independent duty arising from principles of tort law." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra,* 7 Cal.4th at p. 515.)

In sum, the findings favoring Boynton on his claims for breach of contract and intentional misrepresentation were based upon proof of separate elements and separate facts. Hence, Boynton was entitled to recover compensatory damages from Wray on the independent tort theory that Wray made false promises inducing Boynton to enter the parties' oral agreement in reliance upon Wray and his oral commitment.

(ii)

BOYNTON'S ENTITLEMENT TO PUNITIVE DAMAGES AGAINST WRAY ON UNDERLYING FRAUD CLAIM

Responding to special interrogatories the jury found Wray intentionally misrepresented to Boynton that he would pay a royalty to Boynton and that he would give Boynton an option to buy stock in Biofilm; and Wray's conduct in making a fraudulent misrepresentation to Boynton constituted malice, fraud or oppression entitling Boynton to punitive damages against Wray. The court awarded Boynton $1 punitive damages against Wray.

Characterizing Wray's intentional misrepresentation cause of action as simply an illegal contract claim insufficient to support punitive damages, Wray attacks the punitive damages award favoring Boynton as lacking an underlying tort. However, as discussed, Boynton was entitled to recovery from Wray on the independent tort theory of intentional misrepresentation through false promise. (§§ 1709, 1710, subd. 4; *Freeman & Mills, Inc. v. Belcher Oil Co., supra*, 11 Cal.4th at p. 102; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at p. 515.) Hence, the punitive damage award to Boynton against Wray was proper.

(B)

DARLING v. WRAY

Darling's first amended complaint alleged that in January 1992 Darling and Biofilm entered into a written agreement; under the written agreement Darling would lend Biofilm $60,000 for five years in return for Biofilm's paying interest on the loan and granting Darling an option to buy 25 percent of Biofilm's stock for $500; and Biofilm breached the 1992 written agreement by not providing Darling with a written option to buy 25 percent of Biofilm or, alternatively, not conveying to Darling 25 percent of Biofilm's stock. Darling's first amended complaint also alleged Wray as an individual and on Biofilm's behalf made an intentional misrepresentation by falsely promising to grant Darling an option to buy 25 percent of Biofilm's stock for $500 in return for Darling's lending Biofilm $60,000; in connection with Wray's attempt to obtain the SBA loan, Darling at defendants' request signed a document purporting to terminate his rights to the stock option for $1; Wray promised Darling that such document would not be enforced but defendants later took the position that Darling had released his stock option for $1; in reliance on defendants' promises, Darling lent Biofilm $60,000; and Darling would not have lent

Biofilm the $60,000 if he had known of defendants' actual intention not to honor their promises.

Responding to special interrogatories the jury found that Wray on Biofilm's behalf entered a written contract with Darling to give Darling an option to buy Biofilm stock; Wray and Biofilm breached the written contract made with Darling; Wray on Biofilm's behalf intentionally misrepresented and thus induced Darling to sign a termination of his written option; Wray's conduct on Biofilm's behalf in making a fraudulent misrepresentation to Darling constituted malice, fraud or oppression entitling Darling to punitive damages against Biofilm "or" Wray.

The jury's general verdict found Darling was entitled to $118,525 compensatory damages against Wray and $178,525 compensatory damages against Biofilm. The court entered judgment awarding Darling $118,525 compensatory damages against Wray individually. Applying its alter ego finding, the court entered judgment awarding Darling $178,525 compensatory damages against Biofilm and Wray jointly and severally.

(i)

WRAY'S LIABILITY TO DARLING FOR COMPENSATORY DAMAGES

Wray contends the court erred in entering judgment favoring Darling against Wray on the claims asserted. Specifically, Wray asserts Darling could not recover for breach of written contract since (1) Darling pleaded the contract was formed between Darling and Biofilm; (2) Darling pleaded the contract was breached by Biofilm; (3) Darling did not plead that Wray was a party to the contract or that Wray breached the contract; (4) the contract language identified the contracting parties as Darling and Biofilm, with Wray signing on Biofilm's behalf; (5) no evidence indicated Wray was a party to the contract; and (6) the jury specially found Wray entered the contract "on behalf of Biofilm." Thus, asserting a non-party to a contract cannot breach the contract (*Kingsbury v. Tevco, Inc.* (1978) 79 Cal.App.3d 314, 316-317), Wray contends the jury's further finding that Wray breached the written contract with Darling was erroneous as lacking a factual or legal basis. Wray then concludes the court erred in assertedly awarding Darling compensatory damages against Wray for breach of contract.

However, in awarding Darling compensatory damages against Wray, neither the jury's general verdict nor the court's judgment refers to breach of contract as the basis of such award. Indeed, the general verdict and judgment are silent about the basis for such award. Hence, as we shall explain, on this record the portions of the general verdict and judgment awarding Darling compensatory damages against Wray must be read as based on Darling's cause of action for intentional misrepresentation and, as so interpreted, upheld. (*Hasson v. Ford Motor Co., supra*, 19 Cal.3d at pp. 540-541; *Curtis v. State of California ex rel. Dept. of Transportation, supra*, 128 Cal.App.3d at pp. 689-690.)

The jury specially found Wray on Biofilm's behalf intentionally misrepresented and thus induced Darling to sign a termination of his written option. Asserting the misrepresentation was made only by Biofilm "albeit through its officer and agent" Wray, Wray contends the court erred in entering judgment against him on Darling's cause of action for intentional misrepresentation. However, "[o]fficers are liable for their tortious acts committed on behalf of the corporation whether or not the corporation is also liable. [Citations.]" (*Mayes v. Sturdy Northern Sales, Inc.* (1979) 91 Cal.App.3d 69, 78, disapproved on another point *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*,7 Cal.4th at 521, fn. 10; 2 Witkin, Summary of Cal.

Law (9th ed. 1987) Agency and Employment § 149, pp. 144-145; 9 Witkin, Summary of Cal. Law (9th ed. 1989) Corporations § 113, pp. 612-613; § 2343, subd. 3.[31]) Hence, Wray was liable for his independent tort of fraud against Darling even though Biofilm was also liable.

In sum, given the special finding Wray was liable to Darling for intentional misrepresentation, the court properly awarded Darling compensatory damages against Wray.

(ii)

DARLING'S ENTITLEMENT TO PUNITIVE DAMAGES AGAINST WRAY

The jury specially found that Wray on Biofilm's behalf intentionally misrepresented and thus induced Darling to sign a termination of his written option; and Wray's conduct on Biofilm's behalf in making a fraudulent misrepresentation to Darling constituted malice, fraud or oppression entitling Darling to punitive damages against Biofilm "or" Wray. The court entered judgment awarding Darling punitive damages of $12,500 against Wray and $12,500 against Biofilm.

Asserting the jury's findings indicated that only Biofilm made a fraudulent misrepresentation, Wray attacks the punitive damages award favoring Darling as devoid of an underlying tort. However, as discussed, Wray was liable for his independent tort of intentional misrepresentation against Darling even though Biofilm was also liable. (*Mayes v. Sturdy Northern Sales, Inc., supra*, 91 Cal.App.3d at p. 78)

Citing the punitive damages special interrogatory's use of the disjunctive "or," Wray also attacks the punitive damages award favoring Darling as lacking a predicate finding of malice, fraud or oppression against Wray. (§ 3294, subd. (a).) However, as discussed, by focusing on only one word Wray mischaracterizes the reasonable meaning of the special interrogatory when read as a whole. Although the last phrase of the special interrogatory used the disjunctive "or," the preceding portion was a specific finding that *Wray's conduct* on Biofilm's behalf in making the fraudulent misrepresentation to Darling constituted malice, fraud or oppression. Reasonably read, such language amounted to a finding of malice, fraud or oppression against Wray as well as against Biofilm.

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[31] Section 2343 provides in relevant part: "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency . . . 3. When his acts are wrongful in their nature."

In sum, since Wray made the fraudulent misrepresentation to Darling with malice, fraud or oppression, Darling was properly awarded punitive damages against Wray.

(C)

BSH v. WRAY

BSH sued Wray and Biofilm as transferees of the fraudulent conveyance of Astro-Lube's assets. BSH proceeded against Wray and Biofilm for fraudulently transferring Astro-Lube's assets, conspiring to engage in fraudulent transfer of assets, conspiring to breach fiduciary duty and conspiring to engage in constructive fraud.

BSH's complaint alleged BSH was Astro-Lube's judgment creditor and owned 5 percent of Astro-Lube's stock; Astro-Lube's assets were transferred to Biofilm to hinder BSH's collection of the Los Angeles judgment; Biofilm paid inadequate consideration for those assets, thus transforming Astro-Lube into an empty shell unable to satisfy its liabilities; the purchase price paid by Biofilm was not a reasonably equivalent value in exchange for Astro-Lube's assets; as Astro-Lube's directors and officers, Boynton/Darling/Stoughton had the "fiduciary obligation to refrain from appropriating the assets of Astro-Lube for their own personal use and to the detriment of [BSH] in its capacity as a shareholder and creditor of Astro-Lube"; as repositories of BSH's trust and confidence, Boynton/Darling/Stoughton "owed a fiduciary duty to act with undivided loyalty to [BSH] and not act in a manner adverse to plaintiff's interests"; BSH reasonably relied on Boynton/Darling/Stoughton to protect BSH's interests as a "shareholder and creditor" of Astro-Lube; and Wray and Biofilm conspired with Boynton/Darling/Stoughton/Astro-Lube to breach such fiduciary duties and engage in constructive fraud by causing the transfer of Astro-Lube's assets to Biofilm without adequate consideration and for the purpose of hindering BSH's collection of the Los Angeles judgment.

The jury specially found that Astro-Lube transferred its assets with the actual intent to hinder, delay or defraud its creditors including BSH; Astro-Lube transferred assets to Biofilm and Wray without receiving reasonably equivalent value in exchange; the total value of assets transferred by Astro-Lube to Biofilm and Wray at the time of transfer was $862,000; Biofilm and Wray conspired with Boynton and others to transfer AstroLube's assets with the actual intent to hinder, delay, or defraud Astro-Lube's creditors including BSH; Biofilm and Wray conspired with Boynton and others to cause Astro-Lube to transfer its assets without receiving reasonably equivalent value in exchange; Boynton and Darling breached their fiduciary duties owing to BSH; Biofilm and Wray conspired with Boynton to breach fiduciary duties they owed to BSH; Boynton engaged in acts of constructive fraud intended to deceive BSH; Biofilm, Wray, Boynton and Darling had a confidential/fiduciary relationship with BSH and conspired with others to engage in acts of constructive fraud intended to deceive BSH; with respect to conspiracy to breach fiduciary duty and conspiracy to engage in constructive fraud, the conduct of Biofilm and Wray constituted malice, fraud or oppression entitling BSH to punitive damages; and Biofilm and Wray had unclean hands while Boynton and Darling did not.

The jury awarded BSH $685,621 compensatory damages against Wray and $685,621 compensatory damages against Biofilm. In its judgment, the court awarded BSH $685,621 compensatory damages against Wray. Applying the alter ego doctrine, the court also awarded BSH $685,621 compensatory damages against Biofilm and Wray jointly and severally.

(i)

WRAY'S LIABILITY TO BSH FOR COMPENSATORY DAMAGES

(a)

WRAY CONSPIRED TO BREACH FIDUCIARY DUTY AND ENGAGE IN CONSTRUCTIVE FRAUD AGAINST BSH

Wray attacks as without substantial evidentiary support the portions of the judgment imposing liability on him for conspiring to breach fiduciary duty and conspiring to engage in constructive fraud against BSH. Asserting he did not owe BSH any fiduciary duty, Wray contends as a matter of law he could not be liable for conspiring to breach fiduciary duty. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at pp. 511-514.) Similarly, Wray contends as a matter of law he could not be liable for conspiring to engage in constructive fraud against BSH since assertedly only a person with a pre-existing fiduciary or confidential relationship can engage in constructive fraud. (*Id.* at p. 514; *Kidron v. Movie Acquisition Corp., supra*, 40 Cal.App.4th at pp. 1597-1598.)

Wray acknowledges the trial evidence showed that both he and BSH were Astro-Lube shareholders. Wray also acknowledges that a majority shareholder owes fiduciary duties to minority shareholders. (*Jones v. H. F. Ahmanson & Co.*, *supra*, 1 Cal.3d at pp:. 108-113.) However, asserting he was not an officer, director or majority shareholder of Astro-Lube but instead owned only 5 percent of Astro-Lube's stock, Wray contends as a mere 5 percent shareholder he did not owe fellow minority shareholder BSH any fiduciary duty. (*Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1082-1083.) Hence, Wray concludes that since there was assertedly no substantial evidence he owed BSH any fiduciary duty, he could not properly be held liable to BSH for conspiring to breach fiduciary duty.

In *Lynch v. Cook, supra*, 148 Cal.App.3d 1072, the appellate court stated "a minority shareholder acting in an independent and individual capacity" did not owe "any special fiduciary duty" to another minority shareholder. (*Id.* at pp. 1082-1083.) However, unlike the situation in *Lynch*, with respect to the transactions involving Astro-Lube and BSH, Wray was not acting simply as a, minority shareholder in an independent individual capacity. Instead, as discussed, Astro-Lube shareholder Wray joined in a majority with other shareholders of Astro-Lube and was thus charged with fiduciary duties toward minority shareholder BSH. (*Jones v. H. F. Ahmanson & Co., supra*, 1 Cal.3d at p. 108.) The majority shareholders breached their fiduciary duties to BSH by crafting and implementing a plan resulting in the fraudulent transfer of Astro-Lube's assets to Wray and Biofilm, thus transforming Astro-Lube into an empty shell. Hence, as a member of the majority, Wray could properly be held liable for conspiring to breach fiduciary duty.

Although acknowledging the rule of *Jones v. H. F. Ahmanson & Co., supra*, 1 Cal.3d 93, imposing liability on a member of a majority shareholder bloc for breaching a fiduciary duty to a minority shareholder, Wray contends he could not be liable on that theory under the circumstances here since the jury was not asked to determine whether

Wray personally owed a fiduciary duty to BSH and thus a necessary legal predicate to a finding of breach of fiduciary duty was absent. However, a finding that Wray owed BSH a fiduciary duty was necessarily included in the jury's affirmative answer with respect to Wray in responding to the special interrogatory asking, "Do you find that any defendants conspired to breach fiduciary duties that they had and owed to plaintiff BSH Enterprises, Inc?"[32] A similar implicit finding was necessarily included in the jury's affirmative answer with respect to Wray in response to a special interrogatory asking, "Do you find that any of the defendants had a confidential or fiduciary relationship with BSH Enterprises and conspired with others to engage in acts of constructive fraud which were intended to deceive plaintiff BSH Enterprises?"

Further, even if Wray were a nonfiduciary, he could nonetheless be held liable for conspiring with Astro-Lube and its majority shareholders to breach fiduciary duties since he acted in concert with those others to benefit himself alone in a manner detrimental to minority shareholder BSH by receiving most of Astro-Lube's intangible assets. (*Doctors' Co. v. Superior Court, supra*, 49 Cal.3d at p. 47.) As discussed, although the general rule is that a "nonfiduciary cannot conspire to breach a duty owed only by a fiduciary" (*Kidron v. Movie Acquisition Corp., supra*, 40 Cal.App.4th at p. 1597, citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th 503), the Supreme Court in *Doctors' Co. v. Superior Court, supra*, recognized an exception to the general rule, observing that a nonfiduciary may be held liable for conspiring with a fiduciary to breach fiduciary duties where, as here, the nonfiduciary acts in furtherance of his own financial gain. (*Id.* at p. 47.) Contrary to Wray's contention, we finding nothing in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, disapproving the exception recognized in *Doctors' Co. v. Superior Court, supra.*

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[32] As noted, the trial court instructed the jury: "In order for an alleged conspirator to be liable for conspiracy to breach fiduciary duties, the alleged conspirator must personally owe a fiduciary duty to the party asserting liability."

Wray contends that even if he were a fiduciary under the rule of *Jones v. H. F. Ahmanson & Co., supra*, 1 Cal.3d 93, he owed BSH no duty with respect to the transfer of Astro-Lube's assets to Biofilm since BSH assertedly prosecuted the case only on the theory that the fraudulent transfer harmed BSH in its capacity as a judgment creditor of Astro-Lube hindered in collecting the Los Angeles judgment, not on the theory that BSH was harmed in its capacity as an Astro-Lube minority stockholder whose shares were devalued by the majority's actions. Similarly, Wray contends that even if he were a fiduciary, he could not be liable to BSH since his receipt of the fraudulently transferred assets was assertedly not connected to his status as a minority shareholder of Astro-Lube.[33] In sum, Wray contends since BSH's claims against Wray were based neither on Wray's status as an Astro-Lube shareholder nor on BSH's status as an Astro-Lube shareholder, Wray could not properly be held for conspiracy to breach fiduciary duty.

However, the harm suffered by BSH was directly connected to both its status as an Astro-Lube shareholder and its status as a judgment creditor of Astro-Lube. The fraudulent transfer of Astro-Lube's assets transforming Astro-Lube into an empty shell both devastated the value of BSH's Astro-Lube stock and prevented collection of the Los Angeles judgment. Similarly, Wray's participation in the scheme to make a fraudulent transfer of Astro-Lube's assets was integrally connected with his status as a shareholder of Astro-Lube seeking to avoid a decrease in his share's values resulting from collection of the Los Angeles judgment. Wray's actions eliminated BSH both as a creditor and as a shareholder. That the looming collection of the Los Angeles judgment may have motivated Wray and precipitated his misconduct did not exonerate him.[34]

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[33] Wray would presumably raise those same contentions if he were a nonfiduciary subject to lability for conspiracy to breach fiduciary duty under the exception recognized in Doctors Co. v. Superior Court, supra, 49 Cal.3d 39.

Moreover, as discussed, since the facts here indicated express misrepresentation, active concealment and suppression, BSH's claim for conspiracy to breach fiduciary duty was tantamount to a claim for conspiracy to commit actual fraud in violation of statutory duty. (§§ 1709, 1710, subd. 4.) Under these circumstances, even if Wray were a nonfiduciary he could properly be held liable for conspiracy even without application of the exception recognized in *Doctors' Co. v. Superior Court, supra,* 49 Cal.3d 39. (Cf. *Kidron v. Movie Acquisition Corp., supra*, 40 Cal.App.4th at p. 1598; *Younan v. Equifax Inc., supra, 111 Cal.App.3d at p. 512.)*

For similar reasons, Wray as a member of the majority shareholder bloc was properly held liable for conspiring to engage in constructive fraud involving his failure as a fiduciary to disclose facts he was bound to disclose to BSH. Further, even if Wray were a nonfiduciary, he was properly held liable for acting to benefit himself in conspiring with Astro-Lube and its majority shareholders to engage in constructive fraud involving those fiduciaries' failure to disclose facts they were bound to disclose to BSH. (*Doctors' Co. v. Superior Court, supra*, 49 Cal.3d at p. 47.) Moreover, on this record of express misrepresentation, active concealment and suppression, BSH's claim for conspiracy to commit constructive fraud amounted to a conspiracy to commit actual fraud in violation of statutory duty. (§§ 1709, 1710, subd. 4.) Under these circumstances, even if Wray were a nonfiduciary, he could be held liable for conspiracy even without application of the exception recognized in *Doctors' Co. v. Superior Court, supra.* (Cf. *Kidron v. Movie Acquisition Corp., supra*, 40 Cal.App.4th at p. 1598; *Younan v. Equifax Inc., supra*, 111 Cal.App.3d at p. 512.)

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[34] We note BSH's complaint alleged that as Astro-Lube's directors and officers, Wray's co-conspirators Boynton, Darling and Stoughton had the "fiduciary obligation to refrain from appropriating the assets of Astro-Lube for their own personal use and to the detriment of [BSH] in its capacity as a shareholder and creditor of Astro-Lube."

We also note the court instructed the jury: "A director of a corporation occupies a fiduciary relationship to the corporation and its stockholders and indirectly to its creditors."

In sum, the judgment properly imposed liability on Wray for conspiracy to breach fiduciary duty and conspiracy to engage in constructive fraud.

(b)

MEASURE OF BSH'S COMPENSATORY DAMAGES AGAINST WRAY

At trial BSH pursued statutory claims for money damages against Wray for actual fraud (§ 3439.04, subd. (a)) and constructive fraud (§§ 3439.04, subd. (b), 3439.05). BSH also pursued causes of action for conspiracy to breach fiduciary duty and conspiracy to engage in constructive fraud.

The jury made special findings that the total value of assets transferred by Astro-Lube to Biofilm and Wray at the time of transfer was $862,000. The jury's general verdict awarded BSH $685,621 compensatory damages against Wray and $685,621 compensatory damages against Biofilm. Consistent with the general verdict, the court's judgment awarded BSH $685,621 compensatory damages against Wray. Applying the alter ego doctrine, the court also awarded BSH $685,621 compensatory damages against

Biofilm and Wray jointly and severally. Hence, BSH was awarded a total of $1,371,242 compensatory damages.

Wray contends the court erred in entering judgment favoring BSH against Wray for $685,621 compensatory damages. Wray contends that as a matter of law the maximum permissible amount of BSH's damages as against Wray and Biofilm together was $862,000, the amount expressly found by the jury to be the value of all transferred assets at the time of the trial. (§ 3439.08, subds. (b) & (c).) Wray also asserts there was no evidence permitting an allocation of the $862,000 maximum damages between Wray and Biofilm. However, as discussed, Wray was proerly held liable to BSH for conspiracy to breach fiduciary duty and conspiracy to engage in constructive fraud. Since remedies and measures of damages under the FTA were not exclusive (§ 3439.10; *Monastra v. Konica Business Machines, U.S.A., Inc., supra*, 43 Cal.App.4th at pp. 1639-1640), damages were properly assessed against Wray on the tort theories of conspiracy under tort measures of damages (§ 3333).

In sum, the trial court properly awarded BSH total compensatory damages against Biofilm and Wray together in an amount exceeding the jury-determined value of the transferred assets.[35]

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[35] Since BSH was entitled to tort damages on successful causes of action other than its FTA claim, we need not reach Wray's contention that BSH was collaterally estopped to assert the total value of the transferred assets at time of transfer was more than $375,000, the value of Astro-Lube's assets used by the Los Angeles court in January 1992 to set an appellate bond in BSH's litigation against Astro-Lube.

(C)

BSH'S ENTITLEMENT TO PUNITIVE DAMAGES AGAINST WRAY

The jury specially found that Wray's conduct in conspiring to breach fiduciary duty and conspiring to engage in constructive fraud constituted malice, fraud, or oppression entitling BSH to an award of punitive damages. The court awarded BSH punitive damages of $250,000 against Wray.

Wray contends BSH was not entitled to punitive damages since the findings that Wray engaged in the conspiracies forming the basis for such damages assertedly lacked support in fact or law. However, as discussed, the court properly entered judgment favoring BSH against Wray for conspiring to breach fiduciary duty and conspiring to engage in constructive fraud. Hence, in light of the jury's finding that Wray's actions in committing such misconduct constituted fraud, oppression or malice, imposition of punitive damages favoring BSH against Wray was proper.

3

REASONABLE PUNITIVE DAMAGES ASSESSED AGAINST WRAY

Wray contends the superior court impermissibly imposed the assertedly excessive amount of $262,501 total punitive damages against Wray favoring Boynton, Darling, and BSH. (*Adams v. Murakami, supra*, 54 Cal.3d at p. 111.) Asserting the amount of the punitive damages award should have been based on his ability to pay as determined by his net worth assessed under a balance sheet test considering his assets and liabilities, Wray contends the court erred by not considering his net worth in setting the amount of punitive damages. (*Ibid.*)

Wray contends the only evidence of his net worth at the time of the punitive damages phase of trial was a balance sheet he introduced indicating a net worth of negative $870,424. However, as discussed, the record shows the superior court followed established legal standards involving net worth in assessing the amount of punitive damages to be imposed on Wray.[36] Further, Wray has not cited the evidence relied upon by the superior court in making the punitive damages award.[37] Such evidence indicated Wray's net worth was at least $5,289,000; Wray was the sole owner of the intellectual property rights to Astroglide, Biofilm's only product; and Wray was the sole owner of his alter ego

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[36] Referring to its review of various cases including *Adams v. Murakami, supra* 54 Cal.3d 105; *Kenly v. Ukegawa, supra*, 16 Cal.App.4th 49; and *Cummings Medical Corp. v. Occupational Medical Corp., supra*, 10 Cal.App.4th 1291, the superior court stated: "[I]t is clear to me that what needs to be done with regard to wealth is to make a determination based in essence on some sort of balance sheet analysis. ¶ You have to take into consideration liabilities. It is also clear to me that you cannot focus on any one particular aspect. You must take all of the information together."

[37] As discussed, the superior court noted the "wide variety of information" presented with regard to defendants' wealth. The court also indicated that its responsibility "with regard to wealth is to make a determination based in essence on some sort of balance sheet analysis." The court stated its belief that the balance sheet prepared for Wray was not 'true, exact and accurate" because the information put into the balance sheet "may be somewhat lacking." Moreover, the court stated: "One other important point to make is that once you (have determined current wealth] for Biofilm, it is extremely important, because Mr. Wray has the intellectual property rights. Mr. Wray is the sole stockholder of Biofilm, and that severely impacts his financial condition as well. He's carrying those items at relatively zero may not be a true and accurate reflection of his net worth. ¶ Therefore, that's why it is important to take all of that information, balance it, and make a determination as to Biofilm's current financial status, when then helps me to analyze defendant Wray's current financial status."

Biofilm, shown by the evidence to have a minimum net worth between $5 million and $7 million. Based upon such substantial evidence, the court assessed $267,501 total punitive damages against Wray favoring BSH, Boynton and Darling. Such punitive damages were about 5 percent of Wray's net worth.

In sum, on this record the total punitive damage award against Wray was not excessive. (See e.g., *Wollersheim v. Church of Scientology, supra*, 212 Cal.App.3d at p. 906; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d at p. 389; *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 182; *Schomer v. Smidt, supra*, 113 Cal.App.3d at p. 836; *Zhadan v. Downtown Los Angeles Motor Distributors, Inc.* (1979) 100 Cal.App.3d 821.)

4

COURT'S FINDING BIOFILM WAS WRAY'S ALTER EGO

Wray attacks the court's determination Biofilm was his alter ego as assertedly lacking substantial evidentiary support. A "corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require." (*Mesler v. Bragg Management Co., supra*, 39 Cal.3d at p. 301.) "Alter ego is a limited doctrine, invoked only where recognition of the corporate form would work an injustice to a third person. [Citation.]" (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285.) To disregard Biofilm's corporate form, superior court was required to find (1) there was a unity of interest and ownership so that the separate personalities of Biofilm and Wray no longer existed and (2) if the acts were treated as Biofilm's alone, an inequitable result would occur. (*Mesler v. Bragg Management Co., supra*, at p. 300.)

Wray contends BSH did not identify sufficient factors to warrant an alter ego finding. However, in effect, Wray improperly seeks reweighing on appeal of conflicting evidence presented at trial. Further, according to Wray, the trial court made no findings supporting imposition of alter ego liability on Wray. The record belies Wray's contention. Moreover, Wray has declined to cite much of the evidence supporting the court's alter ego determination. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1028.)

In concluding that Biofilm was Wray's alter ego and "adherence to the fiction of the separate existence of Biofilm as a corporation would sanction a fraud in this case," the superior court expressly found the "totality" of the evidence "clearly" demonstrated "the existence of a unity of interest in ownership between Biofilm and Mr. Wray such that the separate personalities of the corporation and the individual no longer exists." The court also specified various facts it considered in concluding there was a unity of interest between Wray and Biofilm: (1) Wray formed Biofilm for the purpose of diverting assets from Astro-Lube to BSH's detriment; (2) Wray was the sole owner of all Biofilm stock and had complete control over all Biofilm's acts; (3) Wray owned the trademark for Astroglide, the only product manufactured and distributed by Biofilm, and at any time Wray could unilaterally revoke Biofilm's license to manufacture and distribute Astroglide; (4) Wray personally guaranteed debts of Biofilm including payment of fees to Petty's law firm; (5) Wray paid and continued to pay compensation from his personal checking account for services rendered directly to Biofilm by his father-in-law, and there was no evidence Wray ever requested or required reimbursement from Biofilm; (6) Biofilm paid attorney fees on behalf of Wray in his individual capacity without requiring Wray to reimburse Biofilm, and Biofilm did not require its attorneys to segregate the amount of attorney fees incurred for services rendered on Wray's behalf in his capacity as Biofilm's director and officer from the attorney fees incurred for services rendered on Wray's behalf in his individual capacity; (7) Biofilm was initially capitalized in part through diversion of funds from Astro-Lube, and Biofilm's use of those funds included payment for tenant improvements to its current premises; (8) Biofilm failed to adhere to corporate formalities related to obtaining the approval required in its by-laws for payment of attorney fees on Wray's behalf; (9) Biofilm's corporate records did not adhere to the necessary corporate formality since its minute book did not show evidence of the required approval of payment of attorney fees on Wray's behalf; (10) Wray treated Biofilm's assets as his own based on the diversion of Biofilm's funds to himself and family members for compensation, bonuses and royalties; and (11) Wray admitted the existence of alter ego liability in connection with his application for the SBA loan.

In concluding Biofilm was Wray's alter ego, the superior court also expressly found that an "inequitable result" would follow if the acts here were treated as Biofilm's alone. The court considered Wray's bad faith conduct in (1) conspiring to transfer Astro-Lube's assets with the actual intent to hinder, delay or defraud BSH; (2) conspiring to cause Astro-Lube to transfer its assets without receiving reasonably equivalent value in exchange; and (3) committing misconduct constituting malice, fraud and oppression warranting punitive damages. The court also found the structure of the transaction involving the fraudulent transfer of Astro-Lube's assets to Wray and Biofilm provided Wray with a direct incentive to cause Biofilm to go out of business; as owner of the trademark for Astroglide, Wray had the ability to continue to manufacture and distribute Astroglide if Biofilm ceased to exist; and without imposition of alter ego liability, Wray could continue to manufacture and distribute Astroglide through some other business entity not subject to the judgment entered here favoring BSH.

In sum, substantial evidence supported the trial court's finding that Biofilm was Wray's alter ego.[38]

DISPOSITION

The portions of the judgment imposing liability on defendants for bad faith denial of the existence of contract are reversed. The portions of the judgment favoring Boynton against Biofilm and Wray are modified to provide that Boynton is awarded $274,317 against Biofilm and Wray jointly and severally, consisting of $274,316 compensatory damages and $1 punitive damages. As so modified, the remainder of the judgment is affirmed.

BSH is awarded costs on appeal from Biofilm and Wray. Boynton/Darling, Biofilm and Wray shall bear their own costs on appeal.

/s/ KREMER
KREMER, P. J.

WE CONCUR:

/s/ NARES
NARES, J.

/s/ McDONALD
McDONALD, J.

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[38] Wray also contends the trial court erred in denying his motion for judgment notwithstanding the verdict. However, we need not separately discuss such contention since it is based on the asserted errors already discussed.

D025783

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

CHARLES O. BOYNTON ET AL.,
Plaintiffs and Respondents,
v.
DANIEL X. WRAY ET AL.,
Defendants and Appellants.

BSH ENTERPRISES, INC.,
Plaintiff and Respondent.
v.
BIOFILM, INC. ET AL.,
Defendants and Appellants.

(Super. Ct. No. N62068)
(Super. Ct. No. N64753)

ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT], DENYING PUBLICATION, AND DENYING PETITIONS FOR REHEARING

Filed
Stephen M. Kelly, Clerk
October 10, 1997
Court of Appeals Fourth District

THE COURT:

The opinion filed September 16, 1997, is modified as follows:

1. The last sentence on page 23 is modified to read: If Biofilm believed the bankruptcy court erred in not making such determination, Biofilm's remedy, if any, was through review in the federal system.

2. The first sentence on page 47 is modified to read: For similar reasons, Biofilm was also properly held liable for acting to benefit itself in conspiring with Astro-Lube and its majority shareholders to engage in constructive fraud involving those fiduciaries' failure to disclose facts they were bound to disclose to BSH.

3. The citation in footnote 33 at page 79 is modified to read: *Doctors' Co. instead of Doctors Co.*

There is no change in the judgment.

The request for publication of the opinion is denied.

The petitions for rehearing are denied.

/s/ KREMER, P.J.

KREMER, P.J.

Copies to: All parties

COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE
750 B Street, Suite 500
San Diego, California 92101

October 10, 1997

Robert F. Wandruff, Clerk
Supreme Court of California
303 Second Street, South Tower
San Francisco, CA 94107-1317

Dear Mr. Wandruff:

Re: Boynton et al. v. Wray et al., D025783, Filed 9/16/97

I enclose a request to publish the opinion in the above matter, together with a copy of the opinion.

This court recommends the opinion not be published on the ground it does not meet the standards for publication.

Very truly yours,

/s/ DANIEL J. KREMER
DANIEL J. KREMER
Presiding Justice

Encls.
cc: All parties

SUPERIOR COURT OF CALIFORNIA
County of San Diego

Date: 2/29/96 Dept. 15
Present Hon. Geary D. Cortes
Judge
Clerk: Gail McCarthy
Bailiff: Israel Chapa

Reporter A: Neil Tabachki CSR# 3494
Reporter B: CSR#
Reporter's Address: P.O. Box 128
San Diego, CA 92112-4104

N62068
N64753 CONSOLIDATED CASES

CHARLES BOYNTON,
By: Michael Boyle, Esq.
ANDREW DARLING, *Plaintiffs*
V.
DANIEL WRAY, BIOFILM, INC.
By: Edward McIntyre, Esq.
Defendants
Related Cross-Actions
and
BSH ENTERPRISES, *Plaintiff*
By: Gerald Sauer, Esq.
V.
BIOFILM, INC., *Defendant*
By: Edward McIntyre, Esq.

9:10 a.m. This being the time previously set for Post Trial motions in the above entitled matter, comes now plaintiffs Charles Boynton and Andrew Darling appearing through counsel Daniel Herbert, plaintiff William Henry of BSH Enterprises appearing through counsel Gerald Sauer and defendants Daniel Wray, Biofilm appearing personally and through counsel Edward Mc Intyre.

9:12 a.m. Attorney McIntyre argues motions for New Trial and Judgment Not Withstanding Verdict.

9:30 a.m. Attorney Herbert argues opposition.

9:35 a.m. Attorney Sauer argues opposition.

9:50 a.m. Attorney McIntyre responds.

The Court rules as to:

MOTION FOR NEW TRIAL — DENIED
JUDGMENT NOT WITHSTANDING JURY VERDICT — DENIED page 1 of 2

to BSH Enterprises' Motion to Tax Costs:

Item #3 Deposition costs will be set at $1,680.00
Item #10 Trial notebooks will be set at $1,544.51
Item #11 Video services will be set at $1,665.92
Total costs will be set at $51,946.78

As to Boynton and Darlings' Motion to Tax Costs:

Item #7 witness fees will be set at $1,500.00
Item #10 will be set at $ 607.50
Total costs will be set at $29,798.39

As to BSHs' Default Prove Up:

Court sets the growth rate of Biofilm at 10% which would place, the total damages at $1,841,994.00

Attorney Sauer to prepare new orders.

All previous orders are in full force and affect until further order of the Court. This includes the Injuctive .

BSH Enterprises' Motion to Lift Stay is found not to be properly noticed and is Denied without prejudice. 10:20 a.m. Court is adjourned.

Partial Transcript of June 9, 1995 Superior Court Hearing

MS. PETTY: THE BANKRUPTCY COURT IS ORDERING THAT MR. WRAY AND BIOFILM HAVE SEPARATE COUNSEL. WE'RE APPEARING ON BEHALF OF BIOFILM. MR. MOORE IS ONLY REPRESENTING MR. WRAY IN THE TRIAL.

* * *

MS. PETTY: YES, YOUR HONOR.

WE DID INITIALLY PRODUCE THE OUTCOME THAT PLAINTIFFS' COUNSEL HAS INDICATED THAT THEY WOULD HAVE LIKED TO HAVE HAPPEN IN THIS CASE. WE APPLIED TO REPRESENT BOTH. THE BANKRUPTCY COURT SAID NO AND DENIED THE APPLICATION AND IS REQUIRING THAT BIOFILM HAVE SEPARATE COUNSEL.

I BELIEVE IN LIGHT OF THE COURT'S REQUIREMENT, THE BANKRUPTCY COURT'S REQUIREMENT, THAT HAS TO BE HANDLED IN A WAY WHERE BIOFILM IS TREATED AS A SEPARATE DEFENDANT THROUGHOUT THE PROCEEDINGS OR WE'LL BE IN VIOLATION OF THE BANKRUPTCY COURT'S ORDER.

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THE COURT: WHO IS IN BANKRUPTCY? ONLY BIOFILM, RIGHT?

MS. PETTY: YES.

THE COURT: MR. WRAY IS NOT.

MS. PETTY: NO, HE ISN'T.

THE COURT: SO THE BANKRUPTCY COURT CANNOT TELL ME WHAT TO DO WITH REGARD TO MR. WRAY.

MS. PETTY: CERTAINLY, THEY CANNOT.

THEY CAN TELL ME WHAT TO DO. IF THIS COURT REQUIRES THAT ANY COUNSEL APPEARING FOR THE DEFENDANTS AT THIS TIME ACT ON BEHALF OF BOTH, I HAVE TO REPORT THAT TO THE BANKRUPTCY COURT, AND I BELIEVE I WILL BE TOLD I CANNOT PROCEED.

I'M TRYING TO RESOLVE MY OBLIGATIONS VIS-A-VIS THE BANKRUPTCY COURT IN A MANNER THAT CAUSES THE LEAST DISRUPTION AND CONFUSION WITH THIS TRIAL PROCEEDING. I WELCOME YOUR HELP ON HOW TO DO THAT.

THE COURT: I WON'T TOUCH THAT.

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THE COURT: BUT ONCE YOU WALK THROUGH THAT DOOR, MY TENTATIVE INCLINATION IS THAT BANKRUPTCY CAN'T TELL ME WHAT IS GOING TO HAPPEN WITH MR. WRAY. THEY CAN TELL ME YOU CAN BE HIRED AND YOU MAY BE HIRED, BUT NOT GOING TO TELL ME HOW TO RUN THE ORDER OF PROOF IN THIS COURTROOM.

AND THE OTHER THING IS THE AUTOMATIC STAY FROM BANKRUPTCY WAS LIFTED, SO IT CAME OVER HERE TO STATE LITIGATION. THAT'S IT.

AS FAR AS THEY'RE CONCERNED, THEY AUTHORIZED THE PURPORTEDLY BANKRUPT CORPORATION TO HIRE COUNSEL. THAT'S AS FAR AS THEIR JURISDICTION GOES. IT STOPS AT THE FRONT DOORS OF THIS COURTHOUSE.

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Partial Transcript of June 16, 1995 Bankruptcy Court Hearing

MR. WALLACH: BUT GOING FORWARD FROM THAT POINT, MR. MOORE JOINTLY REPRESENTS THEM. HE DOESN'T HAVE THE EQUITABLE PROBLEM. THE DEBTOR HAS —

THE COURT: HE'S NOT AUTHORIZED BY THIS COURT TO REPRESENT BIOFILM IN THE STATE COURT PROCEEDING. PERIOD. HE'S NOT.

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THE COURT: BASED ON THE TRANSCRIPT, THAT'S NOT WHAT JUDGE CORTES DID. JUDGE CORTES WAS CONCERNED ABOUT THE ORDER OF PROOF AND WAS PRESSED BY MR. BOYLE AND MR. SAUER TO SAY, NO, WE DON'T GIVE YOU TWO SHOTS, TWO BITES AT THE APPLE BECAUSE THAT'S UNFAIR TO PLAINTIFFS EVEN THOUGH WE'VE GOT TWO SETS OF PLAINTIFFS SO HE WASN'T GOING TO ALLOW THAT. IT WASN'T ANY QUESTION OF EXAMINING WHETHER OR NOT THERE WAS ANY CONFLICT. THERE IS NO EVIDENCE OF ANY EXAMINATION ON THIS RECORD, AT LEAST IN THE TRANSCRIPT THAT I HAVE, THAT THAT WAS RAISED OR DISCUSSED OTHER THAN BY MS. PETTY POINTING OUT THAT THIS COURT HAD FOUND THAT BECAUSE OF THE PROBLEM THAT THERE HAD TO BE SEPARATE REPRESENTATION FOR BIOFILM, AND JUDGE CORTES'S ANSWER TO THAT WAS, WELL, ONE OF YOU CAN GO FORWARD REPRESENTING BOTH BUT I'M NOT GOING TO

LET BOTH OF YOU GO FORWARD REPRESENTING EACH CLIENT WITH TWO SHOTS AT IT BUT NOT BECAUSE OF ANY ANALYSIS OF THE COMPLAINT OR THE ALLEGATIONS OR POTENTIAL LIABILITY OR ANY OF THAT SORT OF THING. IS THERE ANYWHERE IN THE TRANSCRIPT YOU CAN SHOW ME WHERE THAT OCCURS?

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THE COURT: BUT THE DILEMMA THAT WE HAVE TODAY IS ACTUALLY CAUSED BY YOURS AND MR. BOYLE'S INSISTENCE THAT THERE SHOULD NOT BE SEPARATE COUNSEL FOR EACH MR. WRAY AND BIOFILM GOING FORWARD IN THE CONTEXT OF THE CASE. HAD YOU SAID YES, WE WELCOME MS. PETTY IN THE CASE AND SHE REPRESENTS BIOFILM AND MR. MOORE REPRESENTS MR. WRAY AND LETS GO FORWARD. HAD THAT OCCURRED WE WOULDN'T BE HERE THIS MORNING.

* * *

THE COURT: NO, BUT AT THE SAME TIME THAT WASN'T HER OBLIGATION AT THAT MOMENT IN TIME. THE FACT WAS THIS COURT HAD RULED THAT THERE WAS A CONFLICT. PERIOD.

MR. SAUER: BUT —

THE COURT: AND THERE HAD TO BE SEPARATE REPRESENTATION FOR BIOFILM.

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THE COURT: THEY WERE REQUIRED TO WITHDRAW BASED UPON NOT BEING ABLE TO GO FORWARD AS COUNSEL FOR BIOFILM IN THE STATE COURT WHICH IS WHAT THEY WERE AUTHORIZED TO DO AND I'VE APPROVED THEIR WITHDRAWAL.

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THE COURT: THEY WERE NOT GOING TO BE ALLOWED TO PARTICIPATE AS SEPARATE COUNSEL FOR BIOFILM UNLESS THEY ALSO PURPORTED TO ADVANCE THE INTERESTS OF MR. WRAY IN THAT REPRESENTATION BECAUSE JUDGE CORTES MADE IT VERY CLEAR THAT ONLY ONE PERSON WAS GOING TO BE ABLE TO DO THAT AND IT COULD NOT BE BOTH MR. MOORE AND MS. PETTY DOING THAT EACH FOR THE OTHER. MS. PETTY MADE IT VERY CLEAR AND CORRECTLY SO THAT THIS COURT'S ORDER DID NOT AUTHORIZE HER TO DO THAT ON BEHALF OF MR. WRAY IN ADDITION TO BIOFILM.

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THE COURT: WELL, THE SHORT ANSWER IS THAT IF IT'S A BAD JUDGMENT — IF IT WENT TO THE JURY TODAY AND A JUDGMENT WERE RETURNED AND IT WOULD NOT BE ENFORCEABLE BECAUSE BIOFILM WAS NOT AFFORDED THE OPPORTUNITY FOR SEPARATE REPRESENTATION, THEN THE JUDGMENT'S NO BETTER IF THE CASE KEEPS GOING . . .